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YALE LECTURES ON THE  
RESPONSIBILITIES OF CITIZENSHIP

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RECENT THEORIES OF CITIZENSHIP

## YALE LECTURES ON THE RESPONSIBILITIES OF CITIZENSHIP

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Recent Theories of Citizenship in Its Relation to Govern-  
ment. By Carl Brinkmann.

RECENT  
THEORIES OF CITIZENSHIP  
IN ITS RELATION TO  
GOVERNMENT

BY

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NEW HAVEN · YALE UNIVERSITY PRESS  
LONDON · HUMPHREY MILFORD · OXFORD UNIVERSITY PRESS  
MDCCCCXXVII

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TO MY FRIEND AND COLLEAGUE

EDWIN M. BORCHARD



## P R E F A C E

IN the choice of a subject for my Dodge Lectures, as well as in its treatment, I have tried to serve a double purpose. First, to do what little I could at such an occasion to promote that coöperation between national branches of research which is so much more a desideratum, because so much less a fact, in political than in natural science. Secondly, to bring out if possible what I believe to be the peculiar contributions of German thought to modern political science. These I neither conceive in the light of an original and inborn difference from, nor in that of a recent and equally one-sided return to, the body of Western teaching and convictions, although considerable sections of opinion both in my country and abroad incline to favor one or the other of those views. As in law and politics, so in the science of their foundations, national divergences seem to me largely to make for international harmony, while international harmony may best set forth, instead of obliterating, the real strength of national positions.

C. B.



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# RECENT THEORIES OF CITIZENSHIP IN ITS RELATION TO GOVERNMENT

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## CHAPTER I

### *THE CITIZEN AND THE SUBJECT*

THE expression of my gratitude for having been invited to give these lectures on the Responsibilities of Citizenship goes far beyond the personal note. For the political scientist of my country today there is a unique value in the opportunity of laying some of his work in the shape of the living word and touch before one of the first and oldest of American universities.

It is American thought that has restored to modern learning the conception of Political Science. In Europe there is at present hardly any compact body of research and teaching held together by that denomination. The old group of "*sciences morales et politiques*," as the French said, or "*Staatswissenschaften*," as it was called in Germany, has long since fallen a victim to the restlessly progressing division of scientific labor. Public law and history, political economy and sociology have, without much agreement as to their respective jurisdictions

and contributions, taken over different parts of the old field. And in the recent rise of a new group name, Social Sciences, there even seems to lurk a tendency to discard altogether the former preëminence of the state as the central point of outlook of all the interests in question.

Whatever may have been the deeper-lying causes of this process of disintegration, American science appears to have kept singularly immune from it. As it were, the great reality of your democracy, resting on a very small basis of historical tradition but instead on a decisive amount of practical coöperation, always kept before you the simple and unsophisticated notion of a great corresponding body of rules and experience evolved out of that reality and claiming to be recognized and put in order scientifically. The success of your Faculties and Schools of Political Science is the happy outcome of this situation. So whatever European specialists are contributing towards the solution of the great problems of government and political life will gladly take the opportunity of facing the attention and criticism of the mother discipline still taught in America.

Now there seems from the outset no escaping the statement that German thought and German polity have a reputation of standing

somewhat apart from the general trend of European tradition. I trust I can spare you and myself any reference to the embittered and correspondingly misleading "propaganda" by which both parties in the late war tried to defame each other's political system. The decisive time for political criticism and, at least equally important, self-criticism did not come until after peace had demonstrated to both sides the weaknesses of those exaggerations. It was at that moment that one of the most restless and sincere of our political philosophers, the late Ernst Troeltsch, sought to formulate what he believed to be the relative strength of the German and of the Western political mentality:<sup>1</sup> "On the one hand, the idea of an order eternal, rational, laid by God as a common foundation of morality and law; on the other, an ever new and living embodiment of the historically productive mind. . . . Whoever believes in an eternal divine law of nature, equality of men, and a uniform destination of mankind, holding these to form the essence of humanity, may feel German teaching as a strange mixture of mysticism and brutality. On the contrary to him who sees in History an ever living fullness of individu-

<sup>1</sup> *Naturrecht und Humanität in der Weltpolitik*, reprinted in *Deutscher Geist und Westeuropa* (Tübingen, 1925), p. 7.

ality, bringing forth individual obligations from ever new titles, Western thought may appear as bald rationalism and levelling atomism, as shallowness and pharisaism."

There is no doubt, or at least there seems to be no doubt, as to the body of convictions here put in antagonism to the German mentality. It is what has been fairly unanimously, by its adherents as well as by its adversaries, called the ancient name of the Greek city-state: Democracy. Not so clear on the face of it, as you will have noticed by a certain degree of vagueness even in the expressions of Troeltsch, is his description of the German political mind itself, and we must first try to gain some definite ground of social and historical reality in order to be able to appreciate the merits of the contrast. Is it what popular literature usually denotes as Autocracy? We know that as a matter of historical fact the conception of government and the state as a giant collective being of superhuman, supramoral, and supralegal rank has for the last time taken shape, in terms closely similar to the language of Troeltsch, in the political philosophy of Hegel, and there served as a moral background to those human institutions which were destined to weld the German Empire of Bismarck. But we know at

the same time that this conception is much older than Hegel, that its first historical name was given it under entirely different conditions of political life and political reasoning in Hobbes' *Leviathan*. So we ought to be careful not to identify too narrowly with the circumstances of any definite period or place what might after all turn out to be a necessary element of political thinking generally.

A better approach to the contrasts and difficulties of Democracy opens, I think, from a few simple observations on the everyday data of democratic consciousness. The democratic state, we feel, lives above all from two chief motives, one negative and one affirmative. The first is the absence of legal privilege, the second the presence of the spirit and reality of that active coöperation in government which we may best, with the weighty word chosen by the founder of these Lectures to serve as their common title describe as Citizenship. We may as well say with the French Declaration of the Rights of Man: Equality and Liberty. But then we must keep in mind the close interdependence in which the two stand, and mutually limit and condition each other. Privilege is only to be denied in a *legal* form, *i.e.*, so far as it hampers, instead of promoting, that Liberty which is meant to be

the symbol of Citizenship. And vice versa, Liberty itself can democratically never be conceived as regardless of that legal Equality which alone can assure its coöperative meaning. Now let us see whether these observations may help us in searching a little deeper into the historical antecedents of the community and rivalry of present day governments and political creeds.

By the laws of political combat, every form of creed or government is, historically and logically, opposed to some other, preceding or following or antagonistic, form, the positive and negative sides of which fit into its own negative and positive sides like the joints of a piece of carpentry. So the opposite of democratic equality apparently is the state built on legal privilege, just as the opposite of democratic co-operation is political operation moving one-sidedly from one point or center, one active seat of "authority," to none but passing recipients, "subjects" of that authority. But according to the same laws of political psychology, we can hardly help associating with these rather theoretical notions, in every different situation of time and place, a different group of concrete data lending these notions, for this our particular situation, their historical shape and emotional value. So what democracy as the victori-

ous force of present day political life in Europe or America really means to stand for or against is largely determined by its spiritual and material struggle against its last great predecessor in European society and civilization, that governmental form of absolute monarchy the last mighty remnants of which seem to have definitely vanished with the medieval dynasties of Germany, Austria, and Russia. The privilege of feudal lordship, the authority of rulers and bureaucracies deriving irresponsible rights from the "Grace of God" must have been a living experience to the generations whose passionate energy undertook to realize the gospel of democratic equality and liberty.

Yet as soon as we concentrate our scientific attention upon this necessary linking together of the democratic and of the preceding autocratic experience, we become aware of the fact that historically this our immediate autocratic yesterday is again linked with a day before yesterday to which it itself must at one time have stood in the very same relation of present to past, youth to old age. Indeed most of the best labor bestowed by the present generation on the history of the last three or four centuries has resulted in shedding new and surprising light on this logically almost self-evident fact.

The same monarchical and absolutist state which has been either slowly undermined or suddenly overturned by the rise of democratic ideas and institutions is now definitely and indubitably known to have been the outcome, in its day, of revolutionary processes not less fierce and radical than those which we honor as the cradle of the present forms of government. What, from our viewpoint, presents itself as the incarnation of barbarous force and metaphysical make-believe, suddenly appears, seen from another and an opposite side, to have once been inspired by much the same combating of privilege and striving after rationalist and solidarist policies that Democracy holds dear. Besides the one face absolutism turns towards us there is a second turned towards its own predecessor, the State of Estates, as it is called in my language, and this face, the face of the Renaissance and Machiavelli, of modern Classicism and Napoleon, is, as you see, by no means a medieval face.

Now we might certainly decline to stand still even here and by the famous logical form of infinite regress might again set off the pre-monarchic State of Estates as a modern and progressive thing against any amount of preceding political organizations such as the chequered

systems of medieval church and *seigneurie* or of ancient city and despotism would allow us. But in order to prevent the mistaken belief that I am bent upon some logical playwork, I would rather ask your permission to try to show by two independent lines of argument how closely modern political thought is bound up with the antagonisms and combinations of just those last three systems of European political organization above mentioned.

The one argument is taken from your national history. You know that what has been called the Legend of American Independence consisted in the enthusiasm with which your forefathers conceived and proclaimed in their famous Declaration their revolt from the British allegiance to be the legal and moral protest against the autocracy of George III. This construction we are today entitled to call a legend in so far as American and English historians have proved to satisfaction that what really made the severance from your mother country inevitable was not the absolutism of the British crown or bureaucracy (whom on the contrary you had many things to thank for), but the political jealousy and economic competition of British parliamentary government, *i.e.* a political force which you may either construe as a

later stage of English feudalism or as an earlier stage of English democracy. And it is perhaps not without regard to these historical realities that the builders of your federal Constitution were in their majority inclined to favor, not as would seem to have been suggested by the principles of the War of Independence, "Republican" institutions on purely parliamentary lines, but on the contrary those "monarchical" tendencies which have struck foreign observers even more than yourselves in the institution of your Presidency.

My second argument I may derive from the economic significance of the pre-absolutist, absolutist, and post-absolutist forms of government. It is common knowledge that the classic system of English, and indeed of most of American, economic theory was founded by Adam Smith, much after the fashion of what the French Revolution did in the political field, on an elaborate and thoroughgoing destruction of that "mercantilistic" belief in the economic wisdom of paternal government which had been only one of the many shapes of "enlightened despotism." But if we look not so much to the formal contrasts of free markets and state interference as to the material economic aims and results characteristic of mercantilist govern-

ment, we shall again be surprised to find that before the economic dotage of the “police state” had gone another, more youthful period when this very state had revolutionized the conservative economic systems of the middle ages, the craft guilds of the towns and the open fields of the country, by the cry of economic freedom and equality, be it that the ultimate end in view was to protect the peasant and the petty craftsman from dependence on aristocratic corporate interests, or be it that on the contrary the forces of early capitalist enterprise were let loose and fostered by centralized bureaucracies to get ahead of communal and territorial particularism. So modern political science has not only come to do justice to the indispensable services of a French Colbert, a Prussian Frederick, or a Russian Catherine as precursors of the anti-feudalism, and in some ways, too, the social policy, of Democracy; but even in England the historical criticism of recent years, not uninfluenced by modern socialism, has rescued from the oblivion of Parliamentarism the great economic and social work, or at least the noble patriachism, of the Tudors and earlier Stuarts, as we still see them resplendent in Shakespeare’s histories.

But I must again ask you not to mistake the

drift of these arguments setting out the equivocal character of the autocratic system or period of European statecraft. It is far from me to plead its merits as a compensation for its sins, its youth as an atonement for its degeneracy. As a matter of fact it is not autocracy itself that interests me here for its own sake, but rather the exemplary lesson to be drawn from the relativity of its characteristics. Modern democracy was indeed not the first to indict the lawless forms in which the social and economic blessings of absolute government, even if they were really such, were offered to society. All the best pleas to be made from this viewpoint, the viewpoint of the citizen versus the subject, had already been made by the aristocratic bodies of communal and territorial estates which were conscious of representing, against the inroads of bureaucratic monarchy, the inalienable rights of the medieval political and social system. And I need scarcely warn you not to take lightly the democratic meaning of this attitude of corporate aristocracy. Too firmly rooted for that you see in your American soil the pride of your religious communities, whether Presbyterian or Independent or Roman Catholic, as they have fled from and held out against the persecutions and temptations of the English monarchy, to

have been among the ancestors of European democracy, but also to have saved from out the European past many of the most valuable elements of the corporate systems of the middle ages.

Shortly before the late war one of the most eminent of the younger generation of German public law jurists, the late Kurt Wolzendorff, in his compendious work on the Law of Nature and the Right of Resistance, had begun to elucidate the remarkable fact that all over Europe the "Renaissance" of absolute monarchy, as inspired by the Roman Law conception of the *princeps legibus solutus*, was met by a parallel appeal of the fighting estates and corporations to the primeval "liberties" or "birthrights" of the Germanic peoples as founders of the later European nations.<sup>1</sup> But Wolzendorff himself laid stress on the observation that this first conception of Citizenship in Europe, as I may here call it, had about it nothing of that modern and intellectual individualism which was to end in

<sup>1</sup> *Staatsrecht und Naturrecht in der Lehre von Widerstandsrecht des Volkes* (Gierke's *Untersuchungen zur Deutschen Staats- und Rechtsgeschichte*, 126), Breslau, 1916. Cf. also A. Esmein, *La maxime Princeps legibus solutus est dans l'ancien Droit public français*, Essays in Legal History read before the International Congress of Historical Studies held in London, 1913, edited by P. Vinogradoff, Oxford, 1913.

Herbert Spencer's right of man "to ignore the state." Rather than that, its meaning was akin to the old principle of comradeship (*Genossenschaft*) which Otto Gierke had been at such pains to dig up as the deepest living element of the Germanic idea of government as opposed to the rationalist and authoritative notion of the Roman Corporation. Only whereas Gierke, with the conceivable pride of the generation of 1870, had narrowed his idea of comradeship down to the pre-revolutionary past of his own nation, it was now made quite clear by Wolzendorff that exactly the same idea underlay the great series of more or less successful revolutions against the monarchical idea undertaken by the English Puritans, the French Huguenots, and even the Spanish Catholics, and that more important still, it was the real starting point of the famous theory of government by contract developed in succession by the great political philosophers of Calvinism, Grotius, Althusius, and Rousseau.

This short view of the early forms of European Citizenship will, I think, enable us to draw a few systematic conclusions. The first is that there is a common tradition for all the members of the European family of nations leading up to the main principles of modern democracy, and that there are merely some greater or lesser

differences as to the way in which this development was broken, yet at the same time, in spite of all interruption, continued, by the different admixture of autocratic and bureaucratic principles in the monarchies of France, Middle and Eastern Europe. And now it will be possible, too, to adjudge with a little more scientific precision the relative merits and demerits, from the viewpoint of Citizenship, of the different shapes and stages in our line of development. There are as it were two immense streams of political thought and life we see running parallel to, and at many places crossing and blending with, each other, but issuing from opposite directions. The one, taking its origin in the remote beginnings of social life itself, shows man inseparably bound together with his like in communities of interest where self-assertion is not yet differentiated from subjection to those communities as a whole. Later on, this tie may degenerate into the stupid passiveness of masses borne down by the physical or technical superiority of their rulers, just as it may be resuscitated to the democratic ideal of public-spirited coöperation. Just where this choice between death and new life lies is the source of the other stream, whose name is political reflection instead of comradeship; jealous criticism instead

of pious acquiescence, “*Gesellschaft*” (combination), as the Nestor of German sociologists, Ferdinand Tönnies, has made us used to saying, instead of “*Gemeinschaft*” (community). And in this stream, too, there comes the life and death decision between a negative branch that pursues the element of cold and self-seeking rationalism until the whole is stripped of anything super-individual and returns, through the Spencerian ignorance of the state, to that chaotic *bellum omnium contra omnes* from which society is believed to have saved mankind, and a positive branch that alone constitutes political intelligence, the education of the masses, and the ideal of individual liberty as safeguards, instead of dissolvents, of the political community.

It would be a fascinating task to inquire how the diverse historical and actual systems of government furnishing the materials of our Political Science stand, as to their component elements, on the upward and downward grading of this scale of citizenship. Of still greater scientific importance and at the same time less liable to disturbance by national prejudice is, I think, the question as to what parallel instruments of political and legal technique have by those concrete systems of government been

directed to the same constitutional objectives. Let us start on a few applications of this question beginning with the different ways of realizing the conception, just referred to, of the inalienable rights of citizenship.

It is quite true that the simple and firm consciousness of individual and corporate liberties as legal spheres protected from the interferences of the state, as soon as it tried to give a rational and logical rendering of itself, was bound to fall into many of the traps besetting the dogmatic theories of the Law of Nature, *i.e.*, to mistake the data of some positive law for the dictates of legal reason. Nor is it to be denied, as Professor Léon Duguit of Bordeaux and recently my colleague Hans Kelsen of Vienna have pointed out, that we are hardly carried much further by the ingenious idea of Georg Jellinek (whom some of you may know as one of the first writers to have drawn international attention to the legal implications of American puritanism), that there are such things as "subjective public rights" of the citizen to be protected by the courts in the same manner as his private rights. For if there is no rational way of deducing these public rights as conclusions from the premise of the Law of Nature, the fact that some or others of them are found recognized in

an actual system of government would seem to connect them with the objective existence of that system rather than with any subjective titles placing them in independence from it. None the less, if we do not want to rest content with accepting, in the sense of the notorious theory that might is right, the mere fact of government as sufficient title for its claiming the obedience of its subjects, we shall have to explain the meaning of another indubitable fact of modern political life, *viz.*, that from the very origin of the modern state certain groups of laws, and inside these, again, certain groups of citizens' rights, have stood out as "rigid" instead of "flexible" (to use the terms of my illustrious predecessor in this Lectureship, Lord Bryce), in so far as they have been vested by positive law with sanctions putting them out of the reach of alterations by the executive or even by ordinary legislation. German public law here speaks of "fundamental laws" (*Grundgesetze*) and "fundamental rights" (*Grundrechte*).

I will not here enter into the consequences entailed by this phenomenon for the legal construction of the state itself, because to that I shall have to come back in my later lectures. I will only note that this notion of fundamentality

of laws and rights appears to reach even farther than the field of corresponding legal forms and institutions. Even where we have to deal with a type of flexible "constitution" such as the English body of constitutional statutes and "conventions," we clearly see that in spite of the theoretical possibility of repealing and changing any one of its elements just as unconditionally as any other non-constitutional law, there is in fact an unmistakable superiority attaching at least to the main parts of this constitutional body, whether they be statutory as the Bill of Rights or conventional as the obsolescence of the Royal Veto: they could certainly not be repealed or altered without endangering the whole frame of the Constitution. And it is probably this practical distinction of fundamental laws also in a flexible constitution that Albert Vann Dicey had chiefly in view, when he expounded his well-known doctrine of the Internal Limitations set even to despotic, not to speak of parliamentary, sovereignty. Indeed, a very little reflection shows that sociologically there can be no such thing as a hard and fast line of division between flexible and rigid fundamentals. When we see that constitutional lawgiving is, as in the case of the United States, surrounded with a particularly rigid ap-

paratus of safeguards, we have reason to expect (and we shall later on see confirmed) that there is good cause for this in political considerations lying far deeper than the surface of constitutional formalism. On the other hand, we find a great modern nation like the French living under a loose group of fundamental statutes originally meant to be soon replaced by a far more comprehensive Constitution, but since discovered by political leaders to be a much more preferable frame of government just on account of their looseness and comparative flexibility.

But it is impossible to speak of the different modes constitutive of more or less rigid forms of a fundamental law or fundamental right without having, although perhaps unconsciously, entered on the field of the various contents of such laws or rights. In order to estimate the likelihood of legislative alterations of a constitutional frame one has to know how legislative authority itself is legally and politically composed. And the specific form of rigidity shown by the normal type of a modern "written" constitution presupposes straightway a representative machinery founded, for its own part, on certain constitutionally guaranteed rights of suffrage, as an indirect, or vote, as a direct method of legislative influence to be exer-

cised by the individual citizen. As a matter of fact this peculiar machinery of legislation has throughout appeared to be so characteristic of modern (and indeed of ancient) democracy that it has commonly been assumed to qualify a government as democratic and the status of a subject as that of a citizen, whatever the measure of liberty and equality actually granted in consequence of such legislation. Nay, recent political science in my country<sup>1</sup> has even gone so far as to seek the logical foundation of this primacy of universal suffrage in a new form of legitimistic faith, the dogma of the infallibility of discussion and majority (or, as a modern school of British statesmanship would have it, Government by Conference), which would have stepped in the shoes of monarchical or dictatorial legitimism.

To this construction one could first of all reply that it merely states what might have been expected from the general laws of development governing the career of modern democracy. The road from Status to Contract must, in terms of the constitutional machinery for reaching po-

<sup>1</sup> Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (Munich, 1923), a reprint from *Festgabe der Bonner Juristenfakultät* für E. Zitelmann; for a criticism, see R. Thoma in the *Archiv für Sozialwiss.*, vol. 53, pp. 212 ff.

litical and legislative decisions, lead also from traditional and "organic" to rational and mechanistic arrangements. And today we see even Mussolinist Italy busy devising constitutional and election laws to satisfy this unavoidable exigency, not of time and fashion, but of the social and political conditions of a great modern capitalist country. For this indeed is, I believe, the ultimate explanation of the pervading energy with which Democracy has conquered and still goes on conquering the world of European and American civilization with all its advancing or receding appendices and out-works: It progresses in the wake of the modern economic and social system and partakes of its difficulties as well as its solutions in organizing the fulfilment of the peculiar wants created by the material and spiritual growth of modern society. The whole catalogue of the "fundamental rights" of modern constitutions, so perplexing to lawyers in its vagueness and apparent arbitrariness, becomes intelligible and consistent as soon as you view it in the light of this social and economic service.

It is customary to interpret the democratic fight for liberty of association and a free press either metaphysically as a reconquest of part of the birthrights of man or else, on the con-

trary, from the narrowest technical standpoint as a presupposition of constitutional and revolutionary action and organization. But the most general understanding of the almost monotonous recurrence of those demands in the development of modern government is, in my opinion, only to be gained by reflecting for a moment on the general spread of intellectual education necessitated by the mere concentrations and dispersions of a modern population as well as the complicated social arrangements responsible for the production and distribution of its economic subsistence. However true it may be to say, *e.g.*, that the factory system has not only necessarily, but perhaps even intentionally contributed to degrading pre-capitalist man from a comparatively high standard of social or religious culture, there is, on the other hand, no denying that it took a very intricate and lengthy process of quite different mental cultivation to fashion both employers and workmen for the services of the capitalist market. As our German master of social history, Werner Sombart, has drastically put it, primitive or medieval man had to have all the bones of his spiritual frame thoroughly broken before he learned to adapt himself to the discipline of the modern factory and the modern army.

The only disadvantage to authority in this process of social adaptation, as in so many others, consisted in the fact that it was sooner or later bound to grow out of hand. The drilling of the mercantilist barrack or workhouse was only relieved by the utilitarian education to "facts, hard facts," the appalling picture of which you find drawn in Dickens' *Hard Times*. But then these facts, the facts of early European capitalism, were capable of more than one interpretation, and the schooling acquired in capitalist institutions was very soon applied by socialism to quite unforeseen interpretations of them. This is merely one instance of the peculiarity any social ordering of the mind has of cutting both ways. Although as a rule the growth of democratic citizenship has kept pace with that intensifying of political intelligence not to be separated from liberty of thought and organization, the most enlightened press law (not to speak of Catholic or Bolshevik Indices) will stop short of exposing the young or weak-minded lightheartedly to a literature and art which our Weimar Constitution curtly denotes as "filth and rubbish" (*Schmutz und Schund*), while on the other hand an absolute monarch like Frederick the Great may have known very

well why he made the famous gesture of forbidding his police to "trouble the *gazettes*."

What the fundamental rights of intellectual development did to build up the *social* structure of the modern state, another group of these rights, those safeguarding the freedom of the body and the property of the citizen, accomplished chiefly for the *economic* structure. It is not mere history-mongering to justify this statement first by pointing to some of the specific occasions which gave rise to the construction of such rights. However high the principle of *Habeas Corpus* may seem to lead us again into the theoretic problems of the Law of Nature and the Division of the Powers of Government, evidently the series of disputes which ended with its definite formulation by the English Common Law had at least one of its main roots in the attempt of monarchic bureaucracy to enforce by administrative procedure the financial claims derived from unparliamentary taxation. This was not only the origin of the Great Rebellion in England, but, as you know, played a great part also in your own pre-revolutionary struggle against British Admiralty and Martial Law. The constitutional protection extended to property appears from the outset to have had an even wider application. On the one

hand, it was merely a necessary corollary of the safeguards of personal life and liberty, in so far as, *e.g.*, the all-important economic right of free settlement, the basis of the formation of the capitalist market, could not in most cases be made relevant except by the abolition of seignorial and bureaucratic rights of retention or confiscatory taxation of property connected with the removal of its owner. On the other hand, as I need scarcely remind you, the sacredness of property, as commonly taken to be one of the chief props of modern democracy, was far from limited to the defensive meaning which still encircles it with a sort of martyr's crown. Much more forceful was its offensive meaning as heralding that wholesale economic individualism which, not content with attacking, under the charge of "monopoly," any economic interference of the state, bore down before it, as incompatible with the right of property, the whole system of pre-capitalist collectivism. But let us here pause for a moment to satisfy ourselves again whether this legal and logical construction corresponds to social reality. Let me ask (and there cannot be a better opportunity of testing the absolute and the relative elements of Citizenship): Has even the most rigidly individualistic conception of the right of prop-

erty, under the most favorable circumstances to be imagined, been actually able to make an end of its antagonist, the conception of concurrent rights of the state or other social communities in disposing of economic views and relations? Before America's entrance into the late war your former President, A. T. Hadley, has, in one of the most stirring of his lectures on "Undercurrents in American Politics," already invited attention to the advent of what he termed State Socialism in the Union. Nor is it so easy as is sometimes believed to dismiss the economic experience of practically all civilized nations during and after the War as an absolute exception conditioned by exterior forces and their disturbing effects on what would otherwise have been the normal and peaceful play of economic causes and effects. Not until we understand all this to have been different merely in degree and not in principle from the pre-war development of the capitalist world, shall we succeed in seeing through the enigmatic fact that in spite of the immense varieties of actual socialist influence all over Europe and America, not to say the world, the front of capitalist development and success coincides with the advance of huge systems of either government or private monopoly that

would have seemed to our democratic ancestors (and here and there even now seems to belated contemporaries) one continued violation of Property and all the other Rights of Citizenship.

Of course I need not point out that nothing is further from me than to invite here arguments of the popular kind either for or against the unavoidableness of socialism as a critic or successor of Democracy. On the contrary, what I am concerned with is to show that the ways of Democracy itself are running in ever restless variations between the two extremes of wholesome individualism and wholesome collectivism. Where could you get more striking evidence of that than in the social life of modern America, so jealous from old of its rights of individual citizenship and yet so wary, strenuous, and optimistic in tempering them with the necessary provisos in favor of public interests?

The whole range of possibilities entailing such provisos is not easily even outlined in a few sentences. Suffice it to say that among the current democratic limitations of property attention is often too exclusively bestowed upon things too great or too small to form anything but exceptions to the everyday practice of government. One usually thinks of either the

common and necessarily insignificant acts of administrative seizure of property against compensation or else the more or less revolutionary confiscations inherent in a socialist policy of nationalization or a capital levy. One forgets that midway between the two opens the rich field of what recent technique of government has learnt to do to limit Property by interfering either with its "natural" market revenue, *e.g.*, in the regulation of company rates by "recapture," or directly with particular forms of its distribution, *e.g.*, in the land policies of the feudal areas of Europe or in the settlement policies of municipal corporations. One forgets, too, that Property may be limited not only by hemming in its "natural" workings, but also in a positive sense by enforcing its use in a publicly necessary or desirable manner, and that the art of taxation is perhaps not the last word in the soft pressure here exercised by the democratic state. So the Weimar Constitution of republican Germany in a remarkable article (155) ordains "the working and exploiting of the soil" as a "duty of its owner with regard to the community." But we should err in ascribing this instance of what the Constitution terms the "fundamental duties of the German citizen" to any creed of modern socialism. Its real prototypes are in the

administrative practice of the mercantilist state protecting its peasants from enclosure and beyond that also in the great German legislation following upon the age of Napoleonic reforms, *e.g.*, in the civil law of the Austrian Code of 1811 (§387).

How are we, then, to round off our discussion of Citizenship without getting lost in trains of ideas and institutions on the face of them so bewildering in their interlacings and contradictions? If there is no hope of defining, once for all, the economic boundary of competition and monopoly or the legal boundary between rights and privileges, if, worse than that, there is every likelihood that most of that social reality modern political science has to deal with turns out an inextricable mixture of both, is there at least a chance of Democracy containing a *formal* clue to ensure a definite decision of that eternal lawsuit of Man versus the State? I am afraid even there conscientious thinking lands us in a humble appreciation of the relativity of democratic government.

First the crude conviction of the dualistic State of Estates, that there could be no better safeguard of public liberties than the mutual limitation of the monarchical bureaucracy and the aristocratic corporations, was sadly belied

by the rise of modern absolutism. It was consequently improved by the ingenious doctrines of the Checks and Balances of constitutional government which have found their most lasting expression in the principle of the Separation of Powers. But can it be said that democratic governments either in the past or at present have been at one as to the specific form of that separation which might best guarantee Liberty without leading into anarchy? Can it even be said that there are fixed types of such arrangements definitely characteristic of the great nations or groups of nations in the democratic world? Indeed America seems to have set up from the beginning, in contrast to the parliamentary sovereignty of England, that superiority of the judicature, modelled, as we now suppose, after another English precedent, but since known and imitated all over the world as the peculiar safeguard of American freedom. But then not only England and France have all along firmly adhered to their tradition of the primacy of the Legislature, but republican unions like Switzerland or latterly the Austrian Free State have even gone so far as to prohibit by constitutional law the judicial examination and possible invalidation of statutes. It is interesting to note that republican Germany is at

this moment passing through a transition stage of indecision whether the judiciary shall assume, and shall be left by the Legislature to assume, this right of supreme constitutional control. There must be, as you will understand, powerful motives for that tendency in the great social struggles consequent upon much of the economic and social legislation of the young republic, and although there is a powerful section of German jurisprudence firmly against it, the Supreme Court at Leipzig and especially other supreme courts of administrative jurisdiction created since the Revolution, such as the Finance Court at Munich or the Economic and Pensions Courts, have shown themselves more inclined to embark upon the new judicial policy.<sup>1</sup>

As appears most strikingly from this last instance, the deepest reason for all the differences on the constitutional application of the theory of Separate Powers is that these Powers are not the abstract beings classical thinking believed them to be, but at best legal vessels to be filled with ever new social contents, until at last perhaps the vessels themselves are found to

<sup>1</sup> Cf. here, as throughout, an excellent essay by R. Thoma on "Grundrechte und Polizeigewalt" in *Festschrift für das Preussische Oberverwaltungsgericht* (1925), pp. 183 ff.

have changed their forms in the process. It was undoubtedly in remembrance of the dualistic State of Estates, where the law courts as a rule were in the hands and on the side of the aristocracy longer than the administration, that the constitutional figure of the judge as the maker and preserver of public as well as private law became vested with the supreme dignity you see at its height in Anglo-Saxon constitutions. By the side of the judge democracy was apt to consider all the other functionaries of the state as simple undignified "agents," to be recalled at the will of, and to be closely controlled by, the public, no less than the employees of a private firm by their employer. It is this state of opinion which is still mirrored in the English Common Law of the private liability of officials to compensation for abuse of their powers.<sup>1</sup> No wonder that centuries of democratic education were needed to convince the citizen that it was no treason to, but a requirement of, democracy to guarantee to the official, too, the rights of citizenship involved in his delicate position between the commanding state and the obeying subject.

So we need after all not despair of the legal

<sup>1</sup> See E. M. Borchard, "Government Liability in Tort" in 34 *Yale Law Journal* (1924), pp. 1 ff.

and political position of the Citizen as against the State. Truly they who put their hopes of freedom from the Leviathan on the unchanging devices of some constitutional machinery, will, I fear, be ever again disappointed by seeing abuse and arbitrariness installed just where they had taken their most elaborate precautions to exclude them. From a static view of the state such as this the citizen may well address it in the words of the Psalmist: Whither shall I fly before Thy face? If, however, we make up our minds to face political realities as a dynamic movement resulting ever fresh from the counterplay of institutions and the human will, I think we shall as often find the tables turned and new safeguards of liberty arising in the place of old ones where we had, dogmatically speaking, least expected it. There are many remedies short of revolution to the dissatisfied if only they will learn to make use of the highest of the rights of citizenship, coöperation in a whole of which they cannot cease to be parts.

## CHAPTER II

### *THE METAPHYSICAL STATE*

THE conceptions of Citizenship which have been foremost in building democracy on a heightened respect for the personality of the individual have, by a natural counter-stroke, often developed a tendency to depress that respect for the state the excess of which had proved so conspicuously dangerous to individual independence. Having tried to clear up the composite nature of citizenship as the basis of individual rights, we had therefore best consider next the similar network of popular truths and fallacies, of historical facts and fictions, of legal constructions and logical coherences attaching to the other side, the state side of the picture of modern government.

In an excellent series of lectures Professor L. T. Hobhouse of London University has treated what he terms the Metaphysical Theory of the State, as he sees it embodied scientifically in the philosophy of Hegel and practically in the policy of that historical Prussian government which had found in Hegel both its most ardent prophet and indeed the finest of its

spiritual expressions. I shall again permit myself to pass over the exclusively historical questions raised by Professor Hobhouse's book, without attempting to decide whether it is not, perhaps, generalizing too broadly to establish such direct relations between Hegel and the Germany of 1914, and whether Hegel's Prussia, the Prussia of 1830, may not have received more justice at the hands of great English contemporaries such as Cobden and John Stuart Mill. I shall only use Hobhouse's notion of the metaphysical state, however much or little it may have to do with either Hegel or Prussia, as a starting-point for my inquiry how modern democracy has valued and is to value the reality of the state as different from, and possibly opposed to, the reality of its citizens, taken singly or in the aggregate marked by Utilitarianism.

"In the democratic or humanitarian view," says Hobhouse, "the state is a means. In the metaphysical view it is an end." Now in stating the case in this completely abstract fashion, we may very well doubt whether there has been or is a single democratic nation in the world which has consciously and seriously given up the view here stigmatized as metaphysical. For there would surely be no contradiction in a nation setting an independent value on its exist-

ence as such and yet adhering, at the same time, to the "democratic view" (again to quote Hobhouse) that the state "is the servant of humanity in the double sense that it is to be judged by what it does for the lives of its members and by the part that it plays in the society of humankind." Indeed to some and in some situations the compatibility of viewing the state both as an end and as a means would seem to be so self-evident that a special explanation would be needed of the historical and logical conditions under which this perfectly natural harmony of views could ever have come to be disturbed. Just compare for a moment your position as an individual in some community other than the state, say your church or your family, and you will at once feel how unnatural it would be for you to be obliged to choose between your conviction that it serves either your own or any other interests and the plain consciousness that you "belong" to it and it "belongs" to you quite irrespective of any such interests. Truly the state may force you to do many things against your will, perhaps against your personal ideals. But so may the church or the family, and we cannot be blind to the fact that the same rationalism and individualism which has made men sceptical of the state has not left untouched the

feelings which hold together those other communities. The only possible answer to that would seem to be that it is not the claims of the state as such but the absolutism of these claims where the false metaphysics comes in. Not until the modern state tried to enthrone itself above and rule out any other human allegiance, did it awaken that formidable opposition of the individual man who then stood not only for himself but for all the other communities the state had violated.

Certainly we may say this with a large amount of historical and systematic truth, and still we may rest unsatisfied by the natural movement of reaction depriving the state of any other meaning besides ministering to the purposes of its citizens or of mankind. Even if you reduce the sphere of its activities in the service of these purposes to the social ideal which has been wittily described as "anarchy plus a street constable," you had better be careful what implications you will have to accept with the mere existence of this constable. At least *he* must have, in order to carry out his function of maintaining order and the law, a power and an inspiration apart from the pleasure or consent of all single citizens to be ordered about by him, because every one of them may in turn come into con-

flict with the law. Thus in the apparently humble and insignificant shape of this policeman you are suddenly brought back again to your metaphysical difficulty of an objective, self-consistent state. The reason is that not even in making the state fulfil the most innocuous and indispensable of its tasks, *viz.*, that of keeping legal order, will you be able to do without granting it that minimum of logical independence from the concrete persons of its momentary casual members which you have to grant any sort of club or society with a recognized legal personality.

At this point vulgar criticisms of the metaphysical state evidently run the risk of contradicting theoretical tendencies upon which they themselves, from considerations of quite a different nature, usually lay greatest stress. The non-metaphysical or, as Hobhouse put it, the democratic state, having no other goal but the service of its citizens, must for this very reason insist with the utmost energy that there is such a thing as a reaction upon itself or, as it has also been called, a self-binding force of its legal and contractual enactments, *i.e.*, that not only the citizens are bound to keep the law, but that the state, too, by enacting it, is assumed to have legally promised to execute this and no other

law, and, what is at least equally important, that in dealing with other states a state must also be supposed to be able to enter legal engagements in the same way as its own citizens do amongst themselves. Now if these suppositions are meant to be more than mere ideologies, there is one and only one conclusion to be drawn from them, *viz.*, that "the state" as a being capable of binding itself to such enactments, must be something different from the concrete and momentary person or persons constituting its government legally or as a matter of fact.

Of course there is nothing properly metaphysical in the philosophical sense about this peculiarity of the state. If, on the one hand, a democratic government may derive from it the consciousness of holding a higher trust than merely that expressed in a particular vote of a particular electorate, the citizens forming this electorate, and more especially its minorities having given way to its majorities, may vice versa find consolation in the equally correct view that it is some much higher authority than merely the personal one of their rulers which they consent to obey. Indeed this reciprocal nature of the personality of the state, according as you look at it from above, from the seat of government, or from below, from the standpoint

of the governed, has recently been made to serve the much discussed theory of Hans Kelsen<sup>1</sup> that the state is nothing else than the rule of law personified. As long, he argues, as the political outlook of man is limited to the concrete persons of the rulers and of the ruled, there will be ceaseless strife between the latter claiming their natural freedom from the former and the former trying to obviate this claim by appeal to some elevated mystical personality of the state. Whereas, once both agree in viewing political power as the mere expression of the rule of law, there will be no need either of the theory of individual freedom or of the metaphysical state.

Now, while we are quite ready to acknowledge both that this argument of Kelsen's is logically conclusive and that it represents an important direction actually taken by modern political life, we may still be permitted to raise some doubts as to how far political reality will ever be able to approximate this logical ideal. The answer will, I think, depend on the degree to which any historical state, or even the conception of the state as such, may be found to

<sup>1</sup> See his latest work on *Allgemeine Staatslehre* (Berlin, 1925), *Encyklopädie der Rechts- und Staatswissenschaft*, pp. 321 ff.

correspond to Kelsen's description of the identity between the state and the law. And if, as I am convinced we must, we grant that the social reality of government always contains many other elements than those connected with the upkeep of legal order, it follows that at least empirically we are still far also from that legal evaporation of the opposition between the governors and the governed. But if this is so, if in order to constitute a government not only right, but power for good or evil has to be vested, however conditionally and temporarily, in certain persons at an average neither better nor worse than the average citizen, we are still left where we stood when we found political society subject, first, to the eternal dualism of the individual and the collective body, and secondly, as a consequence, to that notion of the state as something identical neither with the rulers nor with the ruled nor even with an abstraction such as the rule of law.

Perhaps some of you will suggest that it would have been possible to reach this result by a much shorter way and save you all logical hair-splitting into the bargain, if I had simply pointed to the great moral and political fact which the United States means to you or my country to myself. But having started from a discussion

of that scepticism which inclines to suspect of mysticism every conception of the state as an end in itself, I believe you will understand that I have so far purposely refrained from appealing to any observations, however well founded, which might have seemed to be liable to that suspicion. And even now I should not like you to be content, as a reply to the great question of what the state, your state or mine or any other, really is, with my pointing to the dark and intricate mass of convictions, emotions, and impulses conjured up in our consciousness by its mere name. I shall rather go on to try to state explicitly some of the more particular social and political facts we discover when we follow up the general direction of thought indicated by the personal idea of the state.

We have seen that even legally we cannot avoid recognizing it as a living thing reaching far out into the past and into the future beyond the short-lived part our own generation takes in it. Now think of what this comes to historically and socially. The moment we succeed in realizing the whole breadth of the influence which the past and the future, traditions and ideals, exercise upon our political existence, we seem to reach, as it were, an entirely new stage of political experience. Most of what the social sciences

have taught the historian generally has consisted in superseding ideas of things done on purpose by definite individuals in favor of ideas of things happening as a result of collective reaction upon and collective adaptation to circumstances. Just so the conception of the state as a collective being or, to put it less metaphysically, as a collective process, is calculated to open our eyes to a multitude of things which were lost upon us as long as we figured the same process to ourselves as exclusively or predominantly a play and counterplay of individual wills. To the modern political scientist there is something scurrilous in Thomas Jefferson's idea that no generation had a right to bind its successors, and that therefore the "social compact" of government should be renewed periodically. Nor is there need of being disturbed by the recollection that historically it was the anti-democratic romanticism of the Restoration after the French Revolution that contributed most to the spreading of this view, which has since borne preëminently the name of the "organic" view of the state. As a matter of fact its main drift may be, and indeed often has been, completely freed from any romantic mysticism. On the contrary, and here again we come across that curious two-edged relativity we have so

often found attaching to political theories, scarcely had the romantics begun to demonstrate the senselessness of individual rights and wills over against the eternal laws of the state, than their democratic adversaries took to turning the tables upon them by showing that then the will and the privilege of the rulers must be comprised in the same perdition and so the appeal to the primacy of the "organic" state was a game at which two could play.

Scientifically we may deduce from this controversy the dry result that it is only by way of metaphor or abbreviation that we can be allowed to speak of political action in terms of voluntaristic psychology, be it that we want to denounce the "will" of the autocrat or to extol the "consensus" of the democratic community. I cannot attempt here, and indeed I must confess that I think it hardly possible at all, to replace the primitive way of looking at political action as somebody's fault or merit by another equally sweeping method, such as, *e.g.*, the socialist's interpretation of history as a struggle of classes. What I may say positively is that, seen upon the background of its vast objective accumulation of traditions and institutions, action of the state or in the state contains at best a very small component part of individual resolution and reflec-

tion diluted, as the great Italian sociologist, Vilfredo Pareto, would have expressed it, in a mass of residuary non-logical elements, the impulses and habits both of the governors and of the governed. It is true that even democracy, in adhering to its rational procedure of finding and educating leadership to "represent" the masses, likes to go upon the normal assumption that there will be a sort of division of political labor, leaving the thinking and the conscious acting to the former and the more or less ready-minded obeying to the latter.<sup>1</sup> But surely democracy would not be democracy if it took this division for more than a casual accommodation, if it did not rather hold to the conviction that, as easily as the thinking of the leaders may degenerate into lazy routine, political clearness and resolve may at any time break forth from that "people" for whom it has vindicated the "sovereignty" of the state.

Cautioned by the foregoing remarks, we shall perhaps be better able, in trying to understand the super-individual nature of the state, to make our way safely between the Scylla of metaphysical speculations and the Charybdis of legal for-

<sup>1</sup> For a theoretical presentation of this, see the books of Professor Karl Haff of Hamburg, e.g., *Grundlagen einer Körperschaftslehre* (2 vols., Leipzig, 1915-1918).

malism. What are the social realities underlying such customs as, *e.g.*, making the use of, or even some elementary literary training in, a certain language compulsory upon the assumption of office, or even the grant of citizenship, in a state, or to take examples of less rational and more symbolical character, introducing the salute of the flag or instruction in national history into a state's system of elementary education? You at once notice that we are here on the delicate ground of institutions which may hardly seem capable of adequate appreciation except by a state's own citizens, or to use a metaphor, from inside any one nation. Of this we are reminded perhaps most drastically when we have to deal with civilizations outside the wider range of our own. As you know, it has been the constant political mistake of the modern European, if not also the American, to begin by treating the altogether foreign body of customs and traditions he met with in colonizing primitive countries, or even countries of an older civilization like that of Asia, as so much irrelevant superstition and nonsensical obstinacy, and it has not been an altogether voluntary process by which he has in course of time condescended to comprehend that the institutions and usages in question were at best neither more nor less nonsensical and

irrelevant than those of his own civilization. Nor should we be less mistaken in believing that there is any difference but in the degree of risk we run when we try to do justice to the national peculiarities of a nation sharing the general marks of civilization with ours.

On the other hand, there is no question in political practice of shirking the responsibility of understanding one's neighbor at all. Surely the great democratic idea of a common path of development and progress for all nations has at least one important element of truth about it, *viz.*, that if in some future there is to be room for all of them on earth, they are bound to re-discover for themselves the great community of human nature making them, as our historian Leopold Ranke has said, equals before God. But if we do not want to fly so high as that, it will suffice to point to the fact that nations do not show all of them the same degree of coherence as to their national customs and traditions. Just as we observed, in the last lecture, that the stream of traditional comradeship, when running dry in the history of the state, may be taken up by the fresh stream of citizenship springing from democracy, so, as there is no need to remind Americans, democracy may also bring back to the state what autocracy has

failed to preserve or enforce of the symbols of nationhood. In recoiling from "militarism," German or other, it is certainly not so much the general spirit of preparedness to fight and die for your country which you object to (for that neither you nor any other nation could do without) as the piteous attempt to enforce by drill and fear what, in order to be true and efficient, can only grow out of the free minds of the citizens. In comparing the dignity of national peculiarities, the only standard we are left with is the firmness with which they are rooted in or accepted by their nations.

But what is a "nation" in this fundamental sense connected by us with most of the problems of the state in its personal sense? The question would seem to be one of directly practical relevance which cannot wait for the endless theoretical discussions of geographers or historians to reach an indefinite settlement. One may not exactly hold the firm convictions of the late President Wilson as to the applicability of the right of national self-determination and yet acknowledge the plain fact that there is and ever has been such a thing as nationality, *i.e.*, a group of social and cultural facts, necessarily striving to clothe itself into the form of separate legal existence called a state. But what are the

principal at least of those social and cultural facts? First and foremost of all there is doubtless language. Whatever lawyers have done to prove the legal irrelevance of identity of language to the coherence of a political nation, social science will always contradict them when it finds all cases of polyglot states due, like the Swiss one, to quite exceptional circumstances or, like the American and Eastern instances, to transitional stages of political organization leading either up to higher grades of consolidation or down to political disruption. If the sociology of language teaches us that the smallest social group, indeed even a family or a friendship of two, inevitably forms a kind of language of its own, it goes without saying that the nearer you want a state to get to the ideal of a more than legal or rational consensus of its citizens, the more stress you will lay on the bond of speech as the bearer not only of anything incapable of being expressed by interlingual notions, but also as the wonderful abbreviation of those masses of historical recollections and traditions we found constituting the state in the dimension of time. We accordingly observe as the solution next best to unity of language the legal declaration of one of several languages spoken in a nation to be the "national" or state language in

absolute or preëminent use with the authorities and organs of the state.

There is a remarkable linguistic phenomenon to show that it is just modern democracies which appear to have best appreciated the importance of bringing the cultural life of the state, with language as its principal symbol, as close as possible to the legal conception of the state. The French Revolution has taught nations quite a new use of the adjective "national." In France, and also in the Anglo-Saxon democracies, it has come to mean not only, as in the language of nations of a slower democratic development, what belongs to a people apart from its legal constitution and government, but also and even in the first line precisely what belongs to this constitution and government themselves. So the French, speaking of their "*théâtres nationaux*" want to indicate not merely institutions of importance to the whole nation, but downright state institutions, and Anglo-Saxons call "nationalization" what the German Revolution characteristically termed "socialization," *i.e.*, the taking over by the state of private property in the soil and industrial establishments. In America you can study the same linguistic process in yet another shape. "Nation" and "national" for you are the attributes of the

Union over against the States, and without entering, as early as this, into the complicated question of what my next lecture is going to describe as the Pluralistic State, you will allow even a foreigner to state briefly that what you want to express by the preëminence of just these attributes surely is the political preëminence of your Union over your States.

A “nation,” then, may be a social community full-grown in every respect except its constitution as a politically independent whole, or on the contrary a political frame yet to be filled out by the gradual formation of such a community, that is to say, it may either precede or follow, be either more or less than what we call a “state.” But then political science must be interested, at least as much as these extreme and, at bottom, purely theoretical cases, in the hundreds of shades of transition or mixture between them, in order to ascertain the laws governing the relations of the legal and the cultural state. Take first the familiar line of cases at the back of the modern theory of national self-determination and represented by the dismemberment of some, the genesis and expansion of other political sovereignties. Clarendon has a good anecdote of a bishop who was asked what he thought orthodox, and who answered without

hesitation: "Orthodoxy, Sir, is my doxy, heterodoxy is the other fellow's doxy." The practical application of the doctrine of self-determination often reminds one of this anecdote. To scientific observation and induction, however, there must be a middle road between the naïve attitude of the statesman who declares the fight for independence lawful for his allies and unlawful for his enemies, and the scepticism of the philosopher who dismisses the whole argument as mere cant and biased ideology. Undisturbed by both, the political scientist will try to make sure of the typical processes which leave to political sovereignty being claimed as the "right" of a cultural community.

In watching the rise of a new nationality as much as in watching the existence of an old one we are struck by the principal part language usually plays. And this part is especially remarkable because it shows in a paradigmatic manner the blending of voluntary and involuntary processes in the making of a state. As enemies outside and oppositions inside may criticize and perhaps ridicule the way in which a government enforces certain symbols of nationality, you know that again and again similar denunciations have been heaped upon movements and agitations meant to raise for political

purposes a dialect to the level of a written language. A characteristic example is the variety of influences that went to creating, out of a number of Russian dialects, the language and literature of the Ukraine or Little Russia. As the territories in which these dialects are spoken have been and are still divided between different states, Austria and Russia formerly, Poland and Russia today, there have naturally been from time to time very different political and ecclesiastical interests, crossing and recrossing each other, engaged in promoting the consciousness and the practice of that new united language, and German war policy was only responsible for the last, though perhaps most artificial, attempt at building a new political organization on this basis.

But of course there are many other less extreme instances of the like process. The separation of Norway from Sweden in 1905 was preceded not only by the great Norwegian literature of the nineteenth century, but also, more artificially, by an intense nationalist propaganda trying to elevate the Norse dialect to the written language of the Landsvaal, a propaganda which had no direct political point whatever against Sweden, because this dialect was a branch not of Swedish but of the language of

Denmark, with which Norway had been politically united for many more centuries than with Sweden. The chief reason why we get so very many variations to the same cultural phenomenon is, as I said, the close interweaving of conscious individual and subconscious collective action it represents. And what puzzles us most is that it would be hasty to identify the conscious with the political and the subconscious with the non-political sides of it. It is true that one of its most regular features, especially in the case of small nations, is the figure of great national masters and leaders of a language, be they poets or scholars or both, such as have stood at the cradle of most of the languages of the Western and Southern Slavs or of the "Border States" of the Baltic. But it would be a crude fallacy to suppose that because these heroes of the history of language have worked with a definite national purpose, this purpose can in each case be identified with a definite political aim of independence. In fact what gave first rise to the scientific study and spiritual self-consciousness of the Southern Slav languages was the educational system of eighteenth century Austria-Hungary devised to overcome territorial cleavages by the unifying effect of the "enlightened" civilization of that time.

Now I certainly need not have gone so far from America to illustrate my argument, although you are aware of the decisive value your intervention in the late war had for bringing to a close, in the shape of President Wilson's demand of national self-determination, most of the national movements just alluded to. But when I have turned first to them rather than to the linguistic problems presented, *e.g.*, by your Canadian neighborhood or by other parts of the British Empire, I had in mind pointing out to you the more clearly both the differences and the resemblances to be observed between the formation of nationalities in Europe or elsewhere. If national disparity symbolized by language has in present-day Europe entailed a degree of political disintegration accompanied by great economic, but not solely economic disadvantages, and if on the other hand outside Europe the states of the previous European colonists have everywhere found it possible to conciliate even hostile nationalities in favor of very practical political organizations, I do not for a moment deny that it has first of all been the great democratic idea of religious, racial and political toleration which has been responsible for this success. But what I should like to doubt is whether, as most of the adversaries and some

even of the adherents of Democracy would have us believe, it is also the internal weakening or supersession of the national or emotional, as opposed to the purely political or rational element of the state which has largely helped in the success. You can never have come face to face with the political mentality even of a loyal French Canadian or Boerist South African if you concur in this view of democracy. You may perhaps, in the course of centuries, superimpose new political traditions on the top of old ones, but traditions, in the full supra-rational sense from which I started this lecture, they will have to be if they are to achieve this result. There are surely periods, as there are individuals, of a more or less rationalist trend. But a state, as a reality capable of embracing masses of individuals and living through more than one period or situation, must take in and rest upon all the great eternal elements of human nature.

It is strange that the same American statesman whose mission it seems to have been to unbind so many of the latent forces of European nationality, should as a political scientist have often written as if he viewed the State exclusively in the sharp, but misleading, limelight of that service of individual welfare which of

course might be, and has been, accomplished for any community even by national servitude. "Society," says President Wilson in his *State* (§1279), "it must always be remembered, is vastly bigger and more important than its instrument, Government. Government should serve Society, by no means rule or dominate it. Government should not be made an end in itself; it is a means only,—a means to be freely adapted to advance the best interests of the social organism. The State exists for the sake of Society, not Society for the sake of the State." The meaning of these sentences evidently quite depends on how we construe the two notions of Society and Government: if we take the former to signify an internally coherent community and the latter a casual body of officials, we may very well subscribe to every word of President Wilson's. But if on the contrary Society is to be the name of the chaotic welter of competition and crises presented at least by some phases of the modern world, while at the same time Government is allowed to denote the political personality of the State as distinct from its organs,<sup>1</sup> we clearly perceive not only the

<sup>1</sup> For this sense of Government, see in modern German Political Science, especially R. Smend, *Die politische Gewalt im Verfassungstaate*, Festgabe für W. Kahl (Tübingen, 1923).

dangers, but the impossibility of the subordination of Government to Society. If the striving of a nationality for independence were merely directed to the negative end of getting free from state control, it would be equally well fulfilled by anarchy as by any constitution-making. In fact this end has a much more positive and complicated sense. It consists in tearing an old state down only to build a new one instead as a more adequate expression of the nationality in question. For the freedom of the Citizen is not entirely and not even chiefly independence of the State, but dependence on a State of his own making and of his own kind.

There is a legal problem the handling of which by the modern state is a very good illustration of the difficulties both of reducing this state to a mere external rule of law and of extending it to demand a more than external conformity of all its different citizens. This problem is the relation of criminal law to the fundamental rights of citizenship. Formally, it will hardly be contradicted that criminal legislation, as a necessary means of protecting public safety, must be permitted from time to time to revise the boundaries granted to individual arbitrary action. Materially, all democratic governments have in spite of this made more or less

energetic attempts at preventing their executives or even legislatures from using the sovereignty of criminal law as a cloak for arbitrary acts on the part of the state, as *e.g.*, your Constitution has done by its famous prohibition of *ex post facto* laws. Now you see that it must be impossible to decide on principle and once for all between the requirements of our formal rule and the limitations set upon it by material equity. A clear indication of this we find when we come to the connection between penal legislation and the natural self-preservation of the state over against revolutionary and hostile conspiracy, *i.e.*, the law of High Treason. Here we get, on the one hand, an old and deep-rooted tendency to put this crime at the top of social dangers and at the bottom of moral abjectness, whereas, on the other hand, we observe in international criminal law a movement, due to the international fight for democratic principles, towards first absolving "political" crimes from being classed with the "mean" forms of criminality, and next drawing from this practical consequences such as contained in the modern treaties of extradition. In its latest stage this development has even entered from the international into the national sphere of criminal jurisdiction, where reformers

want to account for the infinite varieties of collision between the state and individual opinion by extending the regard paid, say to the conscientious objector, to breach of the law in general if they result from similar conviction. Now there cannot, I think, be the least doubt that, however honorable it may be for the modern state to have paid this tribute to the moral personality of the citizen, it will be, once you have generalized the reserve of individual conviction, only a question of circumstances whether this reserve may not sooner or later become strong enough to dissolve the whole order of the state. The personality of the latter would then have been superseded by that of its citizens much in the same way as in former periods the personality of the citizens had been superseded by that of the state.

And here, I believe, we have reached the deepest point of the problem raised by the opposition of Democracy against the "metaphysical state." The democratic idea of the individual as the ultimate end of the activities of government could never have assumed the overwhelming force which succeeded in changing the whole face of the political world, if it had not rested on something more powerful than legal deductions and their underlying motives

of economic power and utility. It was the religious consciousness of the personal relation of man to his God and of the unique value his personality was irradiated with from this relation which was required to give to political individualism that last and absolute certainty which still forms the backbone of Anglo-Saxon puritanism. So the individualistic conception of citizenship turns out to be neither more nor less "metaphysical" in a deep and genuine sense than the collectivist conceptions it militated against. In its modern, protestant shape it is simply the old Christian idea of the equal human dignity of master and slave that had once before, and at least as thoroughly, revolutionized the world.

As soon, however, as we recognize the religious, and more particularly the Christian, foundations of political individualism, the chief difficulty is, I think, taken out of the way of realizing, with the same clearness, that the same Christian religiousness, only in another aspect, lies at the root of that other series of conceptions viewing the various forms of aggregation of individual personalities, such as the community of the family, the church, the party, or, mightiest of all, the state, themselves as so many personalities of higher power,

speaking mathematically, which lead their lives of potential immortality in the face of God as much as individual and mortal man. It would perhaps be true to some degree, though of course far from the whole truth, to say that, as Protestantism has centered round the renewal of Christian individualism, it has been the secret of Catholic thought to insist again and again on that great conception of the Community as a mystical body which held together the mediæval world, but which can hardly be said to have disappeared even from our modern ways of understanding the laws and the meaning of Society. But as a matter of fact you will remember how forcefully collectivist mysticism has lived also in the modern protestant churches, and on the contrary, how by the unavoidable pressure of the Christian belief in the personality of man, Catholicism has been and still is being brought to develop strong democratic sides. The conclusive point for me here is not this or that historical connection between political and religious systems. It is the striking evidence that what first seemed to be a struggle of pure rationalism against metaphysics is in reality yet another expression of the eternal dualism of Man and the State, whose activities and claims may, for both alike, be exposed to

an ever-increasing keenness of logical and legal analysis, but whose nature must all the same remain equally wedded to religion as the most comprehensive term of the primitive, the emotional, and the traditional.

## CHAPTER III

### *THE PLURALISTIC STATE*

IN the two previous lectures I have treated the relations between the citizen and the state under something of an assumption that there is a general form of existence for each of the two, that it is in the main one kind of power we are subjected to as citizens of a state, and that accordingly it is one and the same side of our individual personality that is touched by citizenship. But although this mode of proceeding is both sanctioned by the traditions of political science and justified logically by certain universal aspects of the relations in question, I surely need no more than merely mention the fact that, in this case too, it is variety instead of uniformity we find when we search deeper into the nature of both citizenship and state. Not only in the sense that this nature varies historically and in these variations shows a functional dependence of each term upon the other, of forms of state upon forms of citizenship and vice versa, but principally in the much more intricate sense that there may be and there certainly are different forms of political power

and of a corresponding mode of subjection or coöperation existing side by side as included in one and the same system of political life at any given time.

In other words: when we contrasted our political allegiance with other ties binding us to non-political forms of social grouping such as the church or the family, we simplified our position in a preliminary way, in so far as we then disregarded the many aspects our political allegiance may take and actually takes in close analogy to those non-political bonds. As Americans, *e.g.*, you are clearly members of two, instead of only one, political communities, the Union and a State inside the Union, even though you do not count your subjection to or coöperation in the authorities of County, District, Corporation or Township as so many separate political relations more or less parallel to the first two. Now you may feel yourselves so far an exception to the general rule of the citizen's simple allegiance to one and only one chief political organization, although you know that this exception classes you in Europe with Unions such as Germany and Switzerland, and outside Europe, *e.g.*, with the still more important, because typical, form of Union assumed by the principal Dominions of the British Empire. But then you

forget that even the citizen of the uniform centralized state which we commonly conceive perhaps in faint remembrance of the ancient city state, as the type of the state generally, very often has a feeling of a narrower, but in proportion more intimate, citizenship inscribed, as it were, into the wider sphere of his national citizenship. And you may easily distinguish different grades as well as different personal or territorial objects of that feeling. With the Scotsman and the Welshman it is at least some degrees warmer, measured from the level of their English patriotism, than with the Breton or Provençal, measured from their French patriotism, and the comparison shows also that this degree of warmth is quite as strongly, if not more strongly, influenced by the particular character of each division of a state as by the general character of that state itself. So, speaking more of political realities than of legal constructions, you probably know by your own experience what an immense difference there may be between the status of the constitutionally equal member states of a Union. Truly, the cultural side of political organization may, under favorable circumstances, make up for the disadvantages conditioned by lack of political importance. The astonishing fact that in my

country Bavarians still talk as if their German citizenship were lagging a long way behind their feelings for their own particular state would seem to rest on an indeed exceptional blending of cultural peculiarity and practical political independence from the preponderance of the central Union. But, on the other hand, the citizen of Vermont will not love his State less, but perhaps more for the reason of its comparative economic and political insignificance, although of course nobody can tell what would be the case if the aristocratic tendency of your Constitution had not, behind the walls of the Senate and the law governing Amendments, secured your States a large measure of real political equality.

It seems almost hopeless to try to derive systematic conclusions from the chequered picture presented at first sight by these cursory observations on state-like communities within the state. And confusion seems to reach its summit when we notice that their range cannot be limited to territorial units such as we have so far taken our illustrations from, but that on the contrary under normal conditions it is just the lowest unit in the scale of political communities, the city or township, which usually appears as the rival of the highest, the state, in

the competition for the attachment of the citizen. On closer inspection, however, this apparently most perplexing of facts is found to contain the key to the whole question. Socially, the dignity of a political community corresponds to the degree of either historical priority or at least relative self-sufficiency it can claim over against the central state. Local communal units have everywhere been the germs of that process of political organization or integration at the end of which we see the modern state or union. What rural communities have missed in cultural development, they have gained in that at least relative independence from the modern capitalist market which has been so strikingly exposed wherever recently inflated currencies came to disturb or destroy this market. And for the relative self-sufficiency of the village the industrial city of course finds compensation in that at least equally relative preëminence of civilization which will always and in spite of all disturbances draw the less developed groups and areas in its wake. This is what is at the background of the problem discussed by administrative lawyers as to whether theoretically there is such a thing as an independent sphere of powers and activities to be claimed

by the local community as distinct from the powers delegated to it by the state.

What the advocates of original communal rights really mean to say is exactly what we have just stated concerning the historical priority of local over central political organization. But their opponents are a little hasty in jumping, from the recognition of this, at once to the conclusion that a "mere" historical circumstance could have no theoretical meaning whatever. Of course a historical fact which is nothing but an antiquarian datum dug up by researchers and taught in books could indeed have no imaginable influence on what interests us here, the real life led by institutions in the consciousness or subconscious mentality of the citizens organized under them. But there is another form of historical facticity, as a living memory of the past, a real co-existent condition of the present and the unbroken continuity of tradition, which not only may be relevant theoretically, but which to me seems to be the essence of things relevant in political theory. A high degree of decentralization, then, whether as a legal norm or as a political fact, ultimately rests on the political vitality of a nation being, so to speak, drawn together in a number of separate circles inside the great national circle.

And the political scientist, in order to explain the changing structures which embody this principle, will have to look out for the conditions strengthening or weakening its application. There has never been an extreme movement in the opposite direction, a degree however high of political centralization, which literally sprang from an isolated despotic will and which was not in reality borne by the political needs of powerful classes, such as the French bourgeoisie of the Revolution which demolished, even to the geographic names, the old territorial divisions of the country, in order to subject the whole of it to the stringent centralistic rule of its new civil and administrative law.

That this was far from being the only possible solution democracy had in store for the political problem of the one and the many is proved by the directly opposite course events took under the English parliamentary system. There, a national government which had astonished the Middle Ages by its early character of centralism had, from the dawn of capitalism on through the revolutions of the seventeenth century, acquired that proverbial alloy of decentralization which introduced the notion of self-government into political science. And, remarkably enough, when European liberalism arose out of the

great struggle between the government of Napoleon and the government of Burke, it was the abhorrence for absolutist centralism which made the bourgeoisie of Germany and other countries largely identify freedom with the ideas of provincial and local self-dependence. Wilhelm von Humboldt's famous essay on the Limits of State Activity, which furnished John Stuart Mill with the motto for his no less famous Essay on Liberty, went so far as to hold actually that not only the liberty, but also the unity of a modern nation could never be guaranteed by state institutions alone, because these always started from the principle of authority, while a "national community" must always ensure consent by the "free coöperation" of the citizens.<sup>1</sup>

The only generalization it seems possible to deduce from these alternating aspects of the attitude of democracy towards what we may call pluralism of government, I take to be that the life of the state, historically as well as systematically, has ever consisted of a changing play of integrating and differentiating processes, not only horizontally in the changing relations of government functions to each other, but also vertically in the changing relations of larger and

<sup>1</sup> See K. Wolzendorff, *Der Reine Staat* (Tübingen, 1920), pp. 12 ff.

smaller units of government. One has been as "natural" as the other, and the various attempts made by political theory at establishing some preference of the one to the other, or at stamping certain compromises between them as preferable to others, have at bottom been the expression of the conflicting social and political forces which had shaped the institutions themselves. So when the German doctrine of pre-war constitutional law spent much ingenuity on proving the fundamental difference between a Union of states resting on organic laws and a Confederation of states resting on international treaty, or on teaching that only a republican Union could create a central sovereignty, while a Union of monarchical states must leave their sovereignties untouched, it was clearly, though of course as a rule unconsciously, ministering to the practical political wants of the new German Empire as opposed both to the older federations of the German nation and to a future which might sacrifice the monarchy to the Union.

I hope I have left no doubt that I do not think of disparaging such and similar constructions as time-serving instruments of the conversion of might into right. They are hardly ever left without their corrections and oppositions in thought or even in reality, but they always point

themselves to important elements of reality which are more than the mere "might" or mere "history" opposition would take them for. What they can generally teach us is a modest preparedness for the relative also in this field of political observation. Let me give only one example of this. Much too dogmatically political science inclines to the tacit assumption that the chief or even regular direction followed by the play of centripetal and centrifugal forces in the state is towards integration. For even if we adhere to the rationalist ideal of a slow advance of the political center of gravity from the village community to the League of Nations, it remains to be seen whether the stages on this main road will in each case be grouped in the same order and not perhaps exchanged for one another in unexpected fashions. I have before mentioned the liberal tendencies of decentralizing the absolutist state. This is not an extreme case, because it preserved as a rule, in spite of all decentralization, the frame of the so-called uniform national state, just as, on the contrary, the young nations rebelling from old Russia or Austria-Hungary seemed to see no alternative to forming completely separate new states. But South America and Asia show you instances of political movements lying between the preserva-

tion and the disruption of a national state. Mexico, Venezuela, and Argentina were converted from uniform into federal governments, and the ultimate solution of the problems of modern China will probably be the disintegration of the central formalism of the old feudal state into a Union of parliamentary states or provinces such as the British Dominions or the members of the Soviet Federation.

This comparative flexibility of the process of federation imparts to it a peculiar fitness to solve the problems of that incessant economic and social change which seems to be inseparable from modern capitalism. Let me remark at the same time how largely modern ideas of federation go upon the lines of the older, pre-monarchical federalism represented by the medieval corporations system. It is certainly no matter of historical chance that the oldest of modern federal constitutions, that of the United States, has on the whole been the most successful and exercised the greatest influence of all. Indeed it has, like federal Germany, had to pass through trials of blood and iron. But these trials have in the main served rather to assert than to change the spirit of its fundamental law. And if different schools of thought and parties of action continue to lay stress on opposite sides of it, their

conflict would seem to be an indication less of real dissension on principles than of a healthy will to life and progress. Theoretically, I believe, your Constitution is one of the best examples of what Hans Kelsen means when he insists on the legal equality of a federation and its parts inside the bounds of what he calls the totality of its legal organization (*Gesamtrechtsordnung*). There is no subjection of the one to the other, but only a subjection of both to the legal order expressed in the constitution. So when this constitution provides that republican government is to be guaranteed to each of the States by the Union, it clearly has no intention of creating a one-sided relation of claim and liability in either direction, but just that mutual connection Lord Bryce wanted to denote in speaking of the equally "indelible" character of the Union and the States. This indelibility is far from precluding development even in the sense of an increase either of state or federal rights. Its meaning merely is that all such changes would have to take place, at least theoretically, by a constitutional consensus between the whole and the parts, analogous to the consensus constitutionally reached in a vote of democratic citizens or representatives.

But even the rigid interpretation of State

sovereignty in your Constitution did not prevent the insertion in it of Territories and the admission of new States, or more recently the addition of colonial annexes of different status. So you will not be surprised to find that the great economic and social upheaval caused in Europe by the late war has seized on the machinery of federalism and decentralization in order to adapt political organization to new conditions. When more than a hundred years ago Napoleon changed the face of the old German Empire by forming new centralized units of administration out of its patchwork of interlocking feudal territories, he could not think of using federalism as a means of combining these units under French supremacy. Direct annexation on the one hand, indirect dependence through international treaties or diplomatic influence on the other, were the only instruments at his disposition for building up what contemporaries were thus justified in taking for a renewal of the ancient and medieval plans of a "universal monarchy." At the close of the late war even conquest had to be clothed in the form either of what the French and their Eastern allies called "reannexations," *i.e.*, territorial transfers under the principle of national self-determination, or else of "mandates" to be exercised under the

authority, however nominal, of the new League of Nations. Both methods clearly made for federalism, as even "reannexed" populations such as that of Alsace-Lorraine or the Slovacs or Croatians are disinclined to suffer at the hands of racial relatives a degree of centralized government they had objected to under foreign rulers. Moreover, some sort of federal régime at least for legal and economic concerns will perhaps turn out to be the only remedy of an excess of national decentralization such as represented by the Baltic Border States or the so-called Austrian Succession States.

And now that I have mentioned economic motives as determining the political organization of modern capitalist Europe much more powerfully than that of the Napoleonic epoch, I may go on to say that economics generally seems to me to have placed European federalism on quite a new basis. What the boldest of your Interstate Commerce regulations would never dream of doing, has been achieved for federal Germany in the formation and under the rule of its new republican constitution. Former state sovereignties have been extinguished or re-divided in a manner similar, if not in degree, at least in principle, to the interference of Napoleon. The whole center of my country, where

previously the traveller might have to cross a state frontier every half-hour, has been combined into the one Free State of Gross-Thüringen, and the Constitution has provided for a continuation of this process of either consolidation or dismemberment by a procedure of initiative and referendum which, while it has so far left the larger states untouched, has in a couple of cases been successfully put in execution to remove particularly flagrant contradictions between political and economic geography.

If we see, in the foregoing instances, the ratio of economic interests make its way indirectly through the reshaping of political organizations, this is not the only use the pluralistic state is put to in present day Europe. A good deal of what you commonly find described as anti-parliamentary or fascist movements in different European countries is nothing else than a variety of tendencies seeking to replace or supplement political centralization, and bound up more or less strongly with modern parliamentarism, by diverse forms of economic decentralization. In the comparative quiet of American politics it would no more occur to you to despair, on economic grounds, of parliamentary government than you would see occasion to alter existing state frontiers. The more

need there is for me to point out that in Europe almost everywhere the past experience of un-practical bureaucracy and the present economic muddle and distress have naturally fostered a spirit of sectional as well as regional independence from the central state. What is termed Industrial Democracy in England and the policy of Vocational or Professional Estates (*Berufständetum*) in Germany<sup>1</sup> is merely the outcome of this conviction that the management not only of local but also of certain general interests of a specific character, economic or other, had better be left by the central political machinery, bureaucratic or parliamentary, to separate bodies, as a rule parliamentary too, but created for the purpose out of sectional groups of the population.

Now you notice at once that progressive and reactionary elements are here mixed in a most curious manner. Reactionary (taking this word in its formal sense without intending moral or political qualifications) is the spirit that tends back from the mere numbers and machines of modern parliamentary and party democracy to a rule of the “expert” in its widest application, embracing the industrial worker from the “cap-

<sup>1</sup> Cf. the writer's article in Volume IV of the *Grundriss der Sozialökonomik* (Tübingen, 1925).

tain of industry" down to the shop steward as well as the family and neighborhood communities on the consumer's side of the market. Progressive would be the feeling that the division of labor, underlying social and political as well as economic development and having created modern systems of bureaucracy and representation as well as modern systems of marketing,<sup>1</sup> would seem to have come to a standstill in the form of centralized parliamentarism and therefore to require continuation by a further specialization of political and economic administration. There is much to be said for both arguments, as you will be aware from your own attempts to prevent party life from repeating the process of petrification by officialdom that has been the sad experience of so many bureaucracies, or correspondingly to induce real experts to undertake public service by making it worth while for them to accept parliamentary seats or administrative posts. Nor is there reason to be disturbed by the fact that in Europe it is the dictatorial forms of government, *c.g.*, in Russia and Italy, that have made the largest practical use of economist and specialist by the

<sup>1</sup> See an exposition of this analogy in H. Kelsen's lecture on *Das Problem des Parlamentarismus* (Vienna and Leipzig, 1926), pp. 7 ff.

side of general political parliamentarism. It is quite possible that dictatorship at the outset was bent on nothing else but turning the flank of democracy with the help of "industrial democracy." But then it would only have been as shortsighted as was absolute monarchy when it created many institutions that were to overturn it one day. The Russian Dictatorship of the Proletariat, *i.e.*, of the highly privileged and closed Communist Party, is now fighting an impassioned struggle with the principle of workmen's councils or soviets which will perhaps succeed in developing from a nominal slogan into something like a real parliamentary democracy. And closely parallel is the direction taken by Italian Mussolinism when it could not help beginning to build up a trade unionism of its own in place of the socialist unionism it had taken such pains to destroy.

I have before claimed for my country the unique constitutional experiment of a federation consisting of flexible instead of rigid elements. I now want to lay stress on another feature of the Weimar Constitution that, I think, stands out with similar boldness as an attempt to utilize the modern conception of the pluralistic state, not in its regional, but in its sectional capacity. Germany today is the only

great country possessing, by the side of its central political parliament, a central economic parliament as an organization destined to embody the more positive and progressive aims of that syndicalism which has proved so impotent in the French and English countries of its theoretical origin. Of the detailed system of economic representation outlined in the closing article of the German constitution only two institutions, at opposite ends of the scale, the Workmen's Shop Councils (*Betriebsräte*) at the lower end and the Imperial Economic Council (*Reichswirtschaftsrat*)<sup>1</sup> at the upper end, have so far gained actuality through corresponding legislation. To the Shop Councils there is a parallel in the English system of Whitley Councils. The Economic Council, which is just at present being transformed from its hitherto merely provisional into a final composition, has up till now no analogy in constitutional law. Practically, it might be said that a parliamentary body like it, composed of delegates of the official Chambers and other representatives of agriculture, industry, commerce, the professions, and the consumers, and with legally rather limited rights of initiative and advice as to

<sup>1</sup> H. Finer, *Representative Government and a Parliament of Industry* (London, 1923).

economic legislation, at best comes to what traditional political parliamentarism reaches in a less circumstantial way by its system of parliamentary committees, be they internal meetings of more or less specializing and expert members of the Legislature or external and possibly mixed commissions charged with the conduct of public enquiries. While granting the similarity and in certain cases perhaps even the superiority of these older parliamentary methods, one must not overlook one chief difference, which is, I think, also an advantage, of economic parliamentarism.

In economic theory and practice the present capitalist world has left behind the old rigid alternative between systems of free competition and systems of state or other interference in favor of mixed organizations in which often the tables are turned and government comes to protect the market against private monopolies of all kinds and sizes. But even there the matter has not ended for us. As we saw that politically a new conception of the meaning and limitations of property has been slowly evolved by our generation, economic life itself has been productive of new forms of activity which appear to refute the prophecies both of socialism and of capitalist apologetics by taking a leaf out of

either's book. If legal persecution of trusts for discrimination and restraint of trade has today ended almost everywhere in the state regulation of public utility enterprise, the reason is clearly neither, as free trade dogmatism would have it, that government has proved incapable of any planning of its own, nor, as socialists have turned the same statement, that government has been drawn into collusion with the economic policy of the ruling classes. What has happened is again the unexpected result that both parties to the old controversy have been forced to arrive at a compromise at least endeavoring to preserve the strong sides of each of them. To perceive this one need not think of the big licensed trusts of Soviet Russia or even of that German system of syndicates that has wrongly been held responsible for most of the envy and distrust incurred by our pre-war industry. Let me just remind you of a passage on the question in Professor John Bates Clark's book on *The Control of Trusts*:<sup>1</sup> "A nearly ideal condition of organization would be that in which, in every department of industry, there should be one great corporation, working without friction and with enormous economy, and compelled to give to the public the full benefit of that economy."

<sup>1</sup> Revised edition, p. 29.

Now this is indeed an *ideal* program depending for its execution, I believe, on economic suppositions and political technique that it will yet take many years to work out even in the leading capitalist countries. For as yet government control will be as liable as private enterprise to slide back from the way of compromise into the old methods of force, open or clandestine, and it may be questioned if the latter will not be found on the average better adapted to the new policy than the former. In different countries the separate powers of government, legislature, executive and judiciary, will probably have contributed their own very different parts to the solution of the problem, but when all has been said, it is quite possible that new governmental machinery will have to be devised to continue and finish the process. So the leading part played, in America and elsewhere, by communal administration on the one and the law courts on the other hand may perhaps have to be supplemented by the creation or evolution of other instruments of a more general and less casual description. And some of these, I am convinced, will lie in the direction indicated by economic parliamentarism.

Conclusive proof of this seems to me to be furnished by the development of the Economic

Council idea in Germany. And here I must venture on a few explanatory remarks, as it is rather common today to hear the case misstated even by many countrymen of mine whose position in economic or scientific life would enable them to know better. The present organization of the German Economic Council as well as of the various collective bodies representative of employers' and workmen's interests on which the Council rests bears the unmistakable marks of compromise with all the weaknesses attaching to compromise in its initiatory stages. It is a compromise not only between the two chief class divisions of capitalist society I have just alluded to, but still more so perhaps between both of them taken together on the one hand and bureaucracy on the other. Bureaucracy and industry have emerged from the deadly struggle of the Great War, each with the more or less conscious ambition to get rid of all the elements of war government that hamper its own interest and authority, but at the same time carefully to preserve all the elements that may be of benefit to itself. Their present balance, therefore, may be construed from opposite standpoints into exactly contrary views. The attitude of industry, especially of the employers, mostly, is a deep aversion to and suspicion of

the government side of economic parliamentarism, and there are few of them capable of appreciating the fact that state regulation of big industrial syndicates like those of the coal and potash production, the widening range of state, communal or "mixed" enterprise, or even the increasing body of social and labor legislation, is the necessary complement to the immense amount of political influence accruing to industry from its new official and corporative organization.<sup>1</sup> There is even an impression that this organization, as it unites employers' and workmen's delegates in a representation of common producers' interests, has done much to promote a kind of egotistic solidarity across the division of classes which would be directed against both the consuming public and the state as its advocate. This being so, you will not be surprised by passionate echoes complaining with equal one-sidedness on behalf of the public and the state, as some of you will remember from the writings of my colleague, M. J. Bonn of Berlin, that government is being "dissolved" by the great employers' and workmen's combinations coming forward to negotiate with the

<sup>1</sup> See P. Giesecke, *Die Rechtsverhältnisse der gemeinwirtschaftlichen Organisationen* (Jena, 1922).

state on economic compensations for their consent to political measures.

It is not easy, while one cannot but admit the large measure of correctness contained in either of these views, to make a positive and optimistic forecast of an organic principle neither side seems in want of. But at any rate, if Germans would turn from criticism of their own industrial democracy to the theoretical thought of foreign political science, they would be surprised to come across recommendations closely corresponding to the development that has taken place in their country. In commenting on the necessity "to bring the members of the legislative assembly into some organic connection with the executive departments," Harold J. Laski,<sup>1</sup> while staunchly opposed to the ideas of the Guild Socialists or even Mr. and Mrs. Sydney Webb's *Social Parliament*, proposes to evolve from parliamentary committees a series of consultative bodies of some dozen members each, "selected, not so much as representative of parties, though parties would be represented upon them, as of the specialized ability on particular questions which the legislature contains.

<sup>1</sup> *A Grammar of Politics* (1925), pp. 349 ff., supplemented, indeed, by the proposal of "advisory bodies" of the Executive on pp. 376 ff.

They would work . . . as a means of bringing to the legislature a definitely competent opinion upon the working of the administrative process. They ought to have access to all papers save those of an especially confidential kind. They should have the power to initiate inquiries in the departments. They should be able to summon public servants before them for the taking of evidence upon particular questions. They should have regular meetings with the minister at which his policy, and especially his legislation, is freely discussed and explained. To them should be submitted those ordinances which every executive is compelled to issue out of its discretion and without immediate legislative sanction."

This is certainly a very good account of much that is admittedly wanting in the average parliamentary preparation of legislative and administrative acts. The only outstanding question appears to be why Mr. Laski, for the purposes he enumerates, keeps so carefully within the orbit of the legislature which might be taken, with regard to much of the business in question, to be no less a party than the executive and consequently to admit of a third element standing more or less impartially between them. As far as I can see, he does not consider

that the present system of committee management already fulfils his design; at least he pronounces expressly against the way he believes committees of Congress or of the French Chamber interfere with their administrations "to nauseaation." The only reason why he should decline admitting to his consultative bodies non-parliamentary "representatives of specialized ability" would seem to be that they would lack the formal sanction of universal election. But surely as long as their coöperation, on the lines of his scheme, would be limited to consultative functions, this lack would be far from a disadvantage, if not positively advantageous, to the institution, provided only there was some other sanction such as delegation by vocational representation which would prevent the executive from packing the committees with its own nominees.

That Mr. Laski should not have seen this might almost astonish us in an author who is known to be one of the strongest advocates of decentralization in the regional sense, and whose respect for municipality as the groundwork of government goes so far as to recommend municipal service as a necessary qualification for parliamentary service. Yet this apparent contradiction may perhaps lead us to

the final problem raised by all pluralistic conceptions of government, *viz.*, whether there is not indeed a certain degree of artificiality adhering to the various devices of making the state innocuous by going beyond the present and the classical degree of separation and specialization of its powers. Whether we study the vertical scale of institutions rising from local to central or federal government, or the horizontal scale of institutions dissolving sovereignty into a system of checks and balances, we seem to notice almost unconsciously that there is a point beyond which the independence of these single institutions may not be stretched with impunity. The violent concentration of sovereignty conditioned by the recent war governments of belligerent and even neutral states has assuredly created a situation reminiscent in more than one particular of the last days of absolute government on the eve of the French Revolution and at the dawn of the new theories of political and economic liberty. There are many persons in all parts of the European and American world who would agree with Franz Oppenheimer<sup>1</sup> that the traditional tightness of central bureaucratic government is a plaster bandage useful for holding broken

<sup>1</sup> *System der Soziologie* (1926), vol. 3, p. 774.

limbs together, but worse than useless when fracture has subsided into the natural life of the organism. Still we feel that there is some fallacy at the bottom of such arguments.

Theories of a pluralistic state have a way of repeating in another, more subtle manner the career of those individualistic conceptions of government as a necessary evil in Mandeville's commonwealth of bees where normally the counterplay of a hundred egoisms results in social harmony. Pluralistic politicians are far from being so crude as that. But instead of the alchemy turning individualism into sociability they think they have another means of getting rid of the forceful side of government whose international application was emphasized by President Wilson in a famous war-speech. Nationally as well as internationally they trust on founding political organization on the exclusive consent and coöperation, not of atomistic individuals, but of those natural and organic groups of individuals extending from the family and the neighborhood to the nation and merging its sovereignty in that of an international league. It was precisely this sense in which the English and American forerunners of socialism, a William Godwin and a Thomas Paine, were proud of calling themselves "an-

archists." But although you see that this positive and constructive anarchism has nothing to do with the creed foreigners are required to renounce on entering the United States, you feel at the same time that in it there are traits hardly less utopian and destructive. It is not only ignorance or neglect of the unruly element of human nature or, more important than that, of the terribly mechanistic character inseparable from the rule of capitalist society, that debars the gospel of love and comradeship from direct application to the government of millions and continents. It is, when all is to be said, the ignorance of the more generous sides of government and obedience as representing an eternal compromise and exchange between living forces. As liberalism has come to understand that there is no despot able to dispense with a minimum measure of consent on the part of his subjects, if only that expressed by the limits of tradition, so and much more so fascism will recognize one day that there can be no majority rule so arbitrary as not to contain in its dictates a measure of regard for minority opinion. A minimum measure, also, it may be, but even that large enough to warn against reversing the process by any form of minority rule. The idea of sovereignty seems to me to mean, not so

much the concrete existence of a force, military or other, of sufficient strength to enforce any mandates it chooses, as that without which any such force is no more than a transient shape: the balanced determination of a whole society to submit to one indivisible form of political existence.



## CHAPTER IV

### *INTERNATIONAL CITIZENSHIP*

WHEN modern individualism began to appeal from the absolute power of princes to the rights of man, the conception of the birthrights of Englishmen, Frenchmen, Germans, or Christians generally was not the only one it found ready to hand. To the abstract and logical nature of those rights any such historical construction must after all seem inadequate: the idea of the rights of man led on to the abstract and logical idea of a *cosmopolis*, an international community of men regarded in their fundamental equality and fraternity, apart from all distinctions of nation or religion, race or color. You know that it has been the fate of the riper stages of democracy to come slowly climbing down from the heights of this political logic and to end almost invariably, at least for political practice, with an awkward feeling that political thought had been over-reaching itself in this utopia of international citizenship. When no longer absolutism but democracy itself was obliged to cope with its practical applications, such as the treatment of

political heresy or the large field of color and national differentiation, it began to dawn on politicians that even logically adding up a sum total is by no means comprehending a totality. So the pendulum of opinion has perhaps come to swing out to the other side as radically as before to the one. We refuse to realize that when our forefathers in the eighteenth century were enthusiastic about feeling themselves "citizens of the world," they were probably moved by much the same texture of cant and ideology, but also of deep spiritual earnestness and conviction that lives in the nationalism of their descendants. Scientifically, it seems to follow that there is nothing left to us but to try to get behind the alternative prejudices of cosmopolitan pacifism and nationalist citizenship by facing the social realities that underlie each of them.

In this attempt, I believe, we may get assistance from the study of the parallel course taken by the development of the notion of international law. To the schools starting from the rationalist faith in a system of natural law, this notion of an international legality not only presented no difficulties, but was the logical rounding off of a view in which national systems were merely more or less skilful and vir-

tuous approximations of the great rules binding all mankind. The more realistic way of looking at the problem that was chosen by the theorists of political sovereignty was practically one continuous protest against the assumption of an international law as embodied in the ideal of an international state. If they saw reason to insist that law and government are inseparable from a concrete power wielded by a concrete body of men, international law must evidently lose to them the possibility of "sanction" accorded to it by the idealists of natural law. The society of nations must cease to deserve that name and instead become the very image of that Hobbesian state of nature and war of all against all that may be only partly removed by the organization of national sovereignties.

Now the first thing to be said in criticism of an opinion that is still responsible for much self-contradiction in the sphere of international law is simply that it is by no means a true description of either past or present realities governing international relations. Just as in any particular state cases of real anarchy usually are events that lie at the limits of probability, so there has hardly ever been such a case in the intercourse of a group of particular states. There has been and still is such a thing as different

spheres of political and cultural organization existing side by side like circles neither touching nor intersecting each other. But as soon as even they come into some contact with each other, I think it clear that this contact must at once lead to the production of forms and habits no less liable to crystallize into rules of custom and law than those prevalent inside each of the two organizations themselves. It is true that this regulation of intersocial contact is far from representing, in its later as well as in its primitive stages, the peaceful harmony pictured by Rousseau's state of nature. But we know that the dream of a golden age, taken too literally, applies neither to group nor to intergroup life, while on the other hand we should be far wrong in undervaluing the element of social order contained even in the hostile relations of separate groups with each other. Not without reason we find a primeval reciprocity of war and trade, hostility and hospitality forming the groundwork of all international law and having left its traces even in the language expressing the position of alienage. For international jurisprudence to speak of a law of war is not a modern cant, as popular opinion is sometimes inclined to suppose, but merely the continuation of that primeval tradition regulating the negative side of

international intercourse as punctually and ceremonially as the positive.

In order to show that struggle does not mean anarchy internationally it might seem to suffice to point out the normality of social phenomena like crime and litigation in national societies. But this carries us at once to the chief point of controversy on the possibility of international law. Even if, in the face of the League of Nations and all sorts of other elaborate systems of international treaty law, sceptics are precluded from playing out the absence of organization as an argument against the legal character of the law of nations, they may still fall back on the old question whether there is any real guaranty of the decision of international litigation and the punishment of international crime comparable to that given by the average government of a national state. To that question we may answer first of all by the counterquestion whether even among civilized states the execution of their laws can always and in every field be depended upon with a degree of probability coming up to practical certainty, and whether the rule of law is not frequently interspersed, not only with single cases, but with whole blanks where the law is known and suffered to be more or less helpless and out of force over

against social reality such as duelling, smuggling or the practical obsoleteness of the Fifteenth Amendment in your Southern States. As soon as we are ready to grant this truth, we can hardly undertake to ground a fundamental difference between national and international law on the fact that the practical guaranty of the latter is as yet some degrees below that of the former. But at any rate if we do not mean by guaranty such an expectation of what is going to happen, but the idea of somebody or at least some legal authority being responsible for what happens, we cannot but admit that in principle the common will of nations creating a system of treaties and conventions intended to bind every one and all of them stands on the same footing as the common will of the citizens of a single nation creating a national system of laws and conventions.

The reason why we find it usually so difficult to see this fundamental identity is twofold. There is first the strong impression of contrast between the rules of national law being normally wielded by strong authority over comparatively weak subjects, and international law being upheld against the strongest of existing political forces by comparatively weak and rudimentary authority. Even where this impression is ade-

quate, it ought not to prevent us from acknowledging that we must not be seduced by it to mix up theoretically the two altogether different parts played by government as a national and as an international organ. Being used to consider government one-sidedly from our individual standpoint as the organ of national citizenship, we easily forget that viewed from outside it is at the same time an organ of international citizenship. As much and as little as it can be said that government is itself bound by its own laws in the sense I have tried to elucidate in my second chapter, it must also be assumed that it is bound by the laws established by itself in international coöperation with other governments. And it is only the overstrained conception of sovereignty denying any such obligation of government internally that is justified in denying also the existence of external or international obligations.

Secondly, however, closer examination of the popular comparison between powerful national and powerless international authority shows that in most cases it is heterogeneous things that are here compared. Under the term of national authority we prefer to think of what ought to be, while under that of international authority our attention unconsciously shifts to

what is. We need only try to correct this fallacy, and we shall become aware how largely the impression voiced above of the different guaranty of national and international law is, as a matter of fact, inadequate. Trying to face in both cases what is instead of what ought to be, we need not join socialism in its "economic interpretation of history" in order to see that, nationally as well as internationally, the constitution of authority is a problem not only of legal construction, but of the social distribution of strength in a political organism. What appears, legally, as the rule of law or the government upholding it, we have long ago learned to understand, socially, as the rule of stronger over weaker classes and groups of individuals. Exactly the same is the case in international organization. Both pacifists and their nationalist adversaries have too often made the common mistake of supposing that the international society of governments consisted of equal units corresponding to the modern notion of national sovereignty and having, like the individual citizens of political rationalism, no choice but between complete unison or complete anarchy. Reality presents us, as it so often does, with a third case. As national government has to be created every day afresh from compromise between the stronger

and the weaker, majority and minority, so international government too takes its rise from among units, and groups of units, of totally different and ever-changing political force and influence. As in national government almost any form of ruling has its exploitation side on which the benefits the rulers take tend to overbalance the benefits they give, so in international government the rule of the strongest is the more apt to be suspected of exploiting egotism, as it is usually surrounded by stronger and more watchful competitors. On the other hand, Britannia's rule of the waves was only intermittently combated by weaker sea powers and disinterested land powers until the rise of great modern rivals lent new accents both to the political fact and to its international appreciation.

That an international hegemony of such magnitude should have been so long felt as almost beneficent, while on land European nations were united in opposing any recurrence of "universal monarchy," is perhaps the most striking proof that the mere presence of political prevalence may well further international as well as national order, as long as it rests on the traditional sufferance and some degree of more or less subjective welfare of all concerned. It is true that in foreign exactly as in internal politics

there is going on that ceaseless development of intellectual and moral consciousness that results at every turn in promoting new political units from tutelage or exclusion to the full-grown membership of a community, and this development certainly makes for democratic liberty and equality in the larger sphere precisely as in the smaller. So (to mention only the greatest example in history) Christianity raised barbarous tribes to the status of nations just as it raised slaves to that of citizens. However, as I have tried to show in my first chapter that this process of individualization must, in the government of the state, be counterbalanced by corresponding processes of new integration, the mere agglomeration of free and equal states cannot be the last word of international policy either. Individual differences of nature or of economic position between citizens are no better accounted for by ignoring them than by simply translating them into political differences. So, internationally, treating a small and weak state formally as the equal of a large and powerful one may be the worst service you can render it. The whole international law of neutrality has been a continuous and coherent attempt at providing for justice to be done to the weaker states in the same manner as what we call social policy

is trying to do justice to weaker citizens. The necessity for both lines of action would only cease under the condition that it should become possible to eliminate all relevant differences of position among nations as among citizens, and you see that international society is at least as far removed from this communist ideal as is national society.

On the contrary, what we discovered to be the chief task of a realist conception of citizenship, *viz.*, to reconcile its natural and traditional elements with the abstract and rational postulates of democracy, we see here transferred to the problem of international citizenship. Instead of wishing to eliminate the organic bonds of common interest and common feeling in favor of a mere legal coördination of units, we ought once more to make bold and see whether we cannot build the international community the stronger by cementing its foundations by the natural coherence of nations and groups of nations. That is the great idea expressed by General Smuts when he declared that the League of Nations, in spite of all its incompleteness and all the new difficulties it presented, ought to make it easier than before for a self-conscious member of the British Empire like the South African Union to reconcile its national with its

imperial allegiance. His meaning clearly was not only that the tension of imperial control would relax when the Empire itself was subjected to the control of a higher organization, for you know best how comparatively insignificant this higher control is for the moment. The much deeper sense carried by the General's view was one that we may test on yet many other points of the present international situation. It is only a very poor or at least a preliminary understanding of international citizenship that would make the superstate appear as the natural ally of citizens against their national or federal state. It is a view that has unfortunately done much to stamp pacifism as the born enemy even of genuine patriotism. If democracy shows a way to combining a healthy jealousy of the rights of citizenship with as healthy a conviction of its duties, it must surely find a means too of consolidating internationalism by strengthening, instead of weakening, comradeship in all the smaller circles to be circumscribed by a League of Nations.

Even the aloofness of the United States from the present League might be adduced in support of this argument. For so far as it represents, not disapproval of the constitution or aims of President Wilson's creation, but only a Washing-

tonian dread of entangling alliances, it is only an expression of the fact that as yet the Union and the League, and perhaps on another side the Russian Union of Soviet Republics, are each of them smaller units inscribed in the larger unit of the diplomatic and legal community of civilized nations. Here we touch upon a decisive feature of the present international situation that brings us back to the moving picture of pluralistic state organization I had occasion to speak of in my third lecture. The frequent failure of governmental action on the side of both parties to the late war has naturally been ascribed by the individuals and nations concerned to inefficiency of personnel and institutions, and the more clearly (and in most cases narrowly) we have learned to limit the responsibility of personal ill will or incapacity, the better we are enabled to conceive the failure of war policies and lastly the war itself as due to insufficient degrees of adaptation between more or less old-fashioned government machinery and an economic and social world confronting it with entirely new problems. So, the idea of state sovereignty as something not only fixed and sacred legally, but above change and progress technically, has undergone much shaking from outside as well as internally. As citi-

zens have more and more come to ask whether a good many public interests might not be better served by institutions of a smaller range than that of the central state, so the modern type of citizen of the world, who has been transferred from the ideological atmosphere of the eighteenth century into the treaty-making and constitution-building of the practical lawyer and business man, has sat down to reflect whether the same may not hold good of institutions of a larger range than the national. Regionalism, sectionalism, or any federalism on the one hand, the policy of international organization on the other, are only different aspects of the same process of transition to new forms of political life, which is too easily viewed by established authorities as one of dissolution. Guarded from excesses and led on to the fields where its quickening and fertilizing influence is most wanted, the process ought to prove and has already proved capable of the richest integrating, constructive, and even conservative effects.

Suspicious nationalism often reproaches this spirit of international federalism with the large preponderance of economic concerns that is its next practical outcome. Something like an innate and deep-set materialism, supposed to be poorly clothed in philanthropic phraseology and

showing off very unfavorably against the spiritualistic attributes of nationalism, is thus made to represent the canting soul of internationalism. There is, however, nothing more natural than that international law and policy should have taken such a decisively economic turn. This fact stands out in clear relief from our comparison of international with national federation. All the great constitutional federations of modern times, your Union based on Hamilton's tariff and banking policy, the new German Empire based on the Zollverein, and the Canadian, Australian, and South African federations based on similar interests of traffic and finance, have followed the law of political readjustment in the wake of the widening of economic areas. But nobody, I think, will dare to say that these proud federal organizations were mere artificial mechanisms meant to serve no purposes but those which had been foremost in actually promoting federation. The laws of social organization are not so simple as that. Neither are the American Fathers of the Constitution sufficiently characterized by those features of consistent plutocracy that have been worked out by modern economic historians, nor would it be right to forget that parallel to the economic expansion resulting in the Zollverein went the

moral and intellectual revival of the German middle classes that gave us the ever memorable Frankfort "Parliament of Professors" of 1848. So inseparably are material welfare and cultural progress bound up with each other in intricate social systems of reciprocal causation.

Let us then be wary not to misinterpret the present economic aspect of international organization. International parliamentarism, as embodied not only in the institutions of Geneva, but much more broadly in the spreading practice of international conference,<sup>1</sup> has that in common with the economic parliamentarism I treated in the last chapter that it gives vent to the democratic principle of discussion and co-operation upon sides hardly yet given sufficient attention by either the bureaucratic or the parliamentary state. As inside this state special bodies of local or sectional interests demand to be taken care of by new special administrative machinery, so outside the state too there are constantly opened new fields of common international concern that transcend the professional diplomat's skill or understanding and consequently tend to develop administrative machinery of their own. It is not only political areas of relatively small size compared with the

<sup>1</sup> See e.g., Sir M. Hankey in *The Round Table* for 1921.

requirements of modern giant capitalism, such as the quarrelsome family of European states, that feel the necessity of international economic arrangements like the common administration of rivers passing through more than one national territory or the financial and technical combination of mining and metallurgic districts lying across the frontiers of two or more of such territories. Even a system of huge political units such as America has after an interval of national rivalry returned to the ideas of international federation symbolized by the Monroe Doctrine or the Pan-American program, and surely this return is not the worse for slowly ceasing to hide economic penetration under the cloak of high-sounding political catch-words, and instead making economic questions, as *e.g.*, that of the fisheries or of capital export and the exploitation of national resources, the open object of public negotiation and conference between equals.

Instead of frightening us, then, as to the genuineness of modern internationalism, the growing universality of economic life ought rather to reassure us of the solidity of its foundations. While former times constantly wavered between lofty ideologies building international castles in the air, and coarse scepticism or even cynicism

believing in nothing but national egotism, we see the present international order growing out of the robust, yet complicated, solidarity of economic and cultural relations that has not so much undermined as overleaped national frontiers. If the theory of international law in my country has recently been perhaps more radical than elsewhere in laying stress upon the independent validity of the international legal order, if it has inclined to shift the predication of sovereignty, in the sense of the largest comprehensive political unit, on from the national to the international sphere,<sup>1</sup> it has clearly been inspired to do so not only by an excess of theorizing instinct but by the great experience of the present age that seems to show the center of political gravity really moving away from an autocracy of the strongest nations towards that state of balance and compromise that ought to be the international corollary of national democracy. If, for example, the modern doctrine of the so-called succession of states has come to emphasize, not so much what the individual state is itself ready to assume of the rights and liabilities of its predecessor, as what it is interna-

<sup>1</sup> This is the drift of the work of Hans Kelsen; for a special application, see Paul Guggenheim, *Beiträge zur völkerrechtlichen Lehre vom Staatenwechsel* (Berlin, 1926).

tionally bound to assume, this is evidently only the scientific expression of the very marked degree in which questions of "sovereign" assumption or repudiation of internationally relevant obligations today depend upon public international opinion and discussion, not only in the case of comparatively small states like those of the Austrian or Russian succession, but even in the case of a world power like Soviet Russia.

It can do no harm to face again and again the fact which Mr. Robert Lansing has recently emphasized in his *Notes on Sovereignty*, that communities of nations as well as nations themselves are ultimately governed from time to time by different sets of preponderant individuals or groups of individuals. Only it would be a mistake, clumsier still in the case of international than in that of national communities, to take a too simple or static view of these preponderating groups. They need not, in order to govern international relations, be themselves national groups, but they may as likely and even more frequently be themselves of international composition, whether groups of powerful statesmen representative of different nations in diplomatic correspondence or conference, or groups of still more powerful, if less publicly visible capitalists or labor representatives co-

operating either directly or indirectly through the mouthpiece of their respective political or diplomatic apparatus. And the international balance of power resulting from the play of all these influences will present ever new and changing aspects, as it will go on from one particular stage or one particular field of international relations to the other. The International, or the several Internationals, of labor are by no means the only organizations that intersect the frontiers of the national state. Popular political nomenclature has used a whole palette of colors to point out that by the side of the Red International there is the Golden International of capital, the Black International of the Catholic Church, or even the Green International of peasants and farmers and the Blue or White International of monarchs and feudal aristocracies. So that nothing would after all be more misleading than to think of modern internationalism as watched over by nobody but pacifist associations and the officials of the League Secretariat at Geneva. Nor would it, on the other hand, be advisable to imagine the diverse sets of international interests I have just referred to as being the mere fleeting and ephemeral instruments of individual or class egotisms ready to fall asunder at the first op-

portunity of rising quarrel or diminishing interest. Under the surface of the old stock of *public* international law, as an organization of states, there is slowly forming another body of rules, conventions, and institutions that take hold of individual citizens and groups of citizens more directly than by means of their political governments. It is the body of international *private* law that has been built up slowly and almost unnoticed by the politician as the legal frame of the growing international range of private business. And perhaps the supreme violence offered to private economic interests by the Peace Treaties that ended the late war will be only the death struggle of a policy of national imperialism already doomed to make room for a new commonwealth of international economic activity. To think so need by no means come up to obsolete Manchester doctrines of the natural harmony of competing economic forces in the world market. It would merely be drawing attention to the way in which these forces tend increasingly to interlock and consolidate, if only for the necessity there is of creating systems of common usages and jurisdictions similar to those the modern national or federal state was called upon to create for a variety of local or regional interests. Po-

litical governments may again and again succumb to the temptation of evading or repudiating, in the name of national honor or "vital" interests, even the strongest ties of international treaty, arbitration, or jurisdiction. But they may take a different view of the binding force of international agreements when they come to provide guarantees of legal form and execution for the international activities of their big national business. And this development of business safety in international law seems recently to have taken a course which makes for an ever increasing degree of international solidarity insomuch as it runs, in contrast to the classical development of modern society generally, from contract to status instead of from status to contract. In pre-war days the chief contents of international private law consisted of matter such as the law of cheques, bills of exchange, or bankruptcy, that was sufficiently provided for by parallel national legislation dealing with individual contracting parties. Today the free international market of which these individual contracts were typical is more and more losing ground to the big and lasting international combinations that are the inevitable outcome of national trusts and syndicates. To deal with

these international combinations, the states that form the modern community of the capitalist world will have by and by to do much more than to harmonize certain internationally more important parts of their legislation. They will have to go deep into the whole structure of their law of civil and commercial association and corporations, with the result of ensuring not only general security of legal procedure, but a series of common legal and judicial institutions for the unhampered flow of international business.

Again, only shortsightedness of a kind not too prevalent, I infer, in America, can incline to underestimate the cultural value of these interesting processes and, while granting their material importance, put them in an absolute contrast to ideal movements like international scientific research, "world literature," or the ethical propaganda of peace and good will among nations. Indeed, if we wanted to be paradoxical, we might almost reverse such popular judgments by insisting that all these spiritual movements must ultimately draw their life-blood from the natural gifts and traditional impulses treasured up in the mind of the great modern nations whereas economic and social relations might boast of creating independent

and autonomous international spheres of their own. In one of the best recent German books on America, Professor Julius Hirsch's *American Economic Miracle*,<sup>1</sup> there is the amazing story of a German engineer asking an American colleague what he thought the threatening deforestation of the American continent might end in. The American answer is characteristic: "Don't worry, then some damned German will invent something." So even the development of such, to all appearance, purely rational interests of mankind as science and technique is assumed to be rooted deeply in the historical soil of national character. But science and technique are on the boundary line between the idealist pursuits of civilization and the realist activities of economic life and can consequently teach us best to do justice to the inextricable connection of both in all forms of political and social organization. We ought to beware of identifying both national and international political thought too closely with either the idealist or the realist sphere of social action.

So far so good. The standpoint our discussion of international citizenship has reached resembles in some way that which we gained in

<sup>1</sup> *Das amerikanische Wirtschaftswunder* (Berlin, 1925), p. 133.

the last chapter with regard to the problem of decentralization of government. Modern political theory and practice exhibit in both respects a strong liking for solutions that lead away from the hard and fast notion of sovereignty so typical of pre-war political science. But as our review of the new possibilities of a pluralistic state only led us at last to an intenser and profounder conception of the central idea of the state, we may ask in conclusion of all that has been said on the ever-widening empire of international political life whether we should not be rash to infer from this grand and hopeful vista that national forms of political existence are on the wane before the onward trend of internationalism. Let me here ask you to look away for the moment from the vast complex of experience and emotion bound up, for every one of us, with our consciousness of *national* citizenship, and coolly fix your eyes upon the possibility pacifists like to take for a certainty, that the present national or federal states may be mere passing stages in the political organization of mankind, no higher in dignity than the feudal territories of Europe or the single colonies of America. Something of a bad conscience would then, and in the dogmatic pacifist's opinion really does, attach to anything that might tend

to preserve and prolong unduly the life of those decrepit institutions, just as to the attitude of the medieval nobleman defending the law of the sword against the law of the state.

Let us begin examining this kind of position from the purely logical, unemotional side. Hans Kelsen has overpointed his ingenious theory of the sovereignty of international law by contending that the state had no alternative but that of either recognizing the superior rank of international law or else setting up its own national law as a sovereign principle theoretically binding every other state in the international community. Now I doubt whether even the most reckless conqueror has ever come up to the level of the second of these alternatives. From the *Pax Romana* to the revolutionary Empire of Napoleon, what we possess of theoretical attempts to lay claim to universal government agrees in proving that the foundation of this claim was always sought in the realization of supra-national ideals of order, welfare, or civilization. But what interests us here is not so much the answer to Kelsen's question as its logical form. Does what we legally comprehend as the idea of a valid international law really make an end of the chief elements connected with our notion of national sovereignty? There

is a clear logical difference not only between a whole and its parts, but also between the last grade in a series of graded combinations of parts, from which there is only the one step of transition to the whole itself, and all the other grades from each of which you can step up and down the ladder as you like. The modern national or federal state in its fully developed form as guardian not only of its own laws, but of its own culture and historical tradition, seems to me to be in the position of that ultimate grade of part inside the whole of a politically organized world. Or, to express myself more logically and freer from historical accidentality: Any political organization that could have no imaginable superior but an organization (if only theoretical) of the whole earth is, to my mind, in a unique situation forbidding comparison with any organization of a lower standing, not only in the sense of privilege, but mainly in the sense of the duty incumbent upon it to be primarily responsible for the maintenance of that highest international organization.<sup>1</sup>

As in the old German Empire that was destroyed by Napoleon direct membership was

<sup>1</sup> See this idea worked out in my contribution on Political Science and Sociology to the *Erinnerungsgabe für Max Weber*, Vol. II (Munich, 1923).

denoted as Imperial Immediateness (*Reichsunmittelbarkeit*), I could here illustrate my meaning by speaking of a World Immediateness of the national and federal states as a direct membership of the *Comitas Gentium*. In fact it is the peculiar consciousness of a highest circle of equals taking pride in common subjection to a still higher form of organization that would be well expressed by this simile. Historians of modern times have again and again been struck by the phenomenon that there is not a single community of national importance in the modern sense that has not developed the peculiar idea of a spiritual mission entrusted to it, and to it alone, for the benefit of mankind. Anglo-Saxon puritanism and democratism is only one of the most rationalized and self-assertive among the different conceptions answering to this type of idea, probably because the range of its actual influence on the political organization of the universe has so far been the largest repetition of the career of precursors like the Roman Empire and the Roman Church. And I need hardly remind you of other missionary ideas that have perhaps been only the fuller of glowing enthusiasm because they were much less able to translate themselves into political reality. The conception of French classicism as

the center of all civilization will die out only with the last Frenchman. The Panslavist dream of saving the world through the Russian peasant and the Orthodox Church has been easily handed on by Czarism to Bolshevism. And it may be that it was chiefly the fact of being hemmed in by these two imposing and menacing rivals which made my country look out so convulsively for all sorts of artificial ideologies to fit its surprising economic expansion.

Who could deny that there is a strong admixture of imperialism, in its popular sense of political and economic conquest, in each of these great national ambitions? But who at the same time would venture to dismiss them for this reason as mere cant and deception of self or others? Try as hard as you can to sever national citizenship, as the plain symbol of national rights and duties, from the temptation of such dreams, and you will suddenly discover that you are by the very act of doing so emptying that citizenship itself of the deepest and noblest of its impulses. The most distrustful of individualists cannot, as a citizen, help his heart going out to the community he loves and finding that only service to it realizes his best self. Just so, as citizens of the world in the old genuine acceptation of the eighteenth century,

we shall always feel the community of the human race strongest when we help to realize the best self, to assert internationally the rights, as well as the duties, of the political whole we are directly responsible for. Thinking of things on the horizon of time and space may truly be much more than reverie. Remember how Nietzsche set up "the land of our children" as the noblest of human and superhuman aims. But the land of our children must, in the deepest sense, ever be the land of our fathers, and strenuous activity in the light of day will ever remain the best worship of ideals that reach beyond the day.









